In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1410

JOSEPH V. AGOSTO,
Petitioner,

VS.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on January 24, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, not published, affirming the order of the Board of Immigration Appeals, is set forth at page i of Appendix A, and the order of the Court of Appeals denying petition for rehearing en banc is set forth at page iii of

Appendix A. The opinion of the Board of Immigration Appeals is set forth in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1977. A timely petition for rehearing en banc was denied on March 23, 1977, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 8 U.S.C. 1105a(a)(5) requires transfer to a United States District Court for a de novo hearing where the Board of Immigration Appeals, the agency charged with making a final administrative determination of petitioner's immigration status, has found that his evidence is sufficient, if believed, to support his claim to United States citizenship.

STATUTE INVOLVED

Section 106(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a)(5), provides as follows:

> Whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of Title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise.

STATEMENT OF THE CASE

Petitioner last arrived in the United States on or about December 11, 1966 and was then admitted upon presentation of a United States passport (R. 349-351).[1] On September 5, 1967, deportation proceedings were commenced against petitioner by issuance of an order to show cause, charging that he was deportable under Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), as an alien who had entered the United States without inspection (R. 349-351). At his initial hearing before a special inquiry officer,[2] petitioner denied that he

[1] ("R.") References are to the certified administrative record, filed in the Court below on June 13, 1975. ("S.R.") References are to the supplemental administrative record filed in the Court below on August 22, 1975. Said record was filed pursuant to Section 106 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a.

[2] "Special inquiry officers" are now referred to as "immigration judges." 8 C.F.R. 1.1(1). For consistency, the latter term will be used throughout this petition.

was an alien (S.R. 28-31). He contended that he was a United States citizen under the provisions of 8 U.S.C. 1401(a)(1) by virtue of his birth in Cleveland, Ohio (S.R. 34), and that he was therefore not amenable to deportation proceedings. 8 U.S.C. 1251.

The petitioner's claim to citizenship rests primarily upon the testimony of three witnesses, Pietro Pianetti (S.R. 323-363; 444-455), his wife, Crocifissa Pianetti (S.R. 363-391; 511-515), and Carmen Ripolino (S.R. 419-444). The Pianettis affiliated the petitioner in Italy in 1943, and a court order was obtained permitting him to assume their surname (R. 355, 422, 688). Both Mr. and Mrs. Pianetti testified that the petitioner is the natural child of Angelica Porello, Mrs. Pianetti's deceased sister, that he was born in the United States and sent to Italy to live with the Pianettis when he was between two and three years of age. The testimony of Carmen Ripolino, the youngest child of Angelica Porello, corroborated the Pianettis' testimony on several important points.

In support of its charge that the petitioner is an alien subject to deportation, the respondent relied entirely on documents made in Italy many years ago purporting to show that the petitioner was born in Italy (R. 667, 97, 419, 422, S.R. 94-95).

The immigration judge found the testimony of the Pianettis and Carmen Ripolino not to be credible (S.R. 608-610). Accordingly, in his decision dated April 11, 1973, he rejected the petitioner's claim to citizenship, found the petitioner to be a deportable alien, and ordered that he be deported to Italy (S.R.

593-627). After summarizing the evidence, the Board of Immigration Appeals concluded that:

> If believed, the testimony of the Pianettis and of Carmen Ripolino clearly refutes the Service's otherwise strong documentary demonstration of the [petitioner's] alienage. (R. 4).

Deferring to the immigration judge on the question of credibility, the Board of Immigration Appeals affirmed the decision of the immigration judge on April 4, 1975 (R. 1-8).

On May 3, 1975, a petition for review was filed requesting transfer of the proceedings to the United States District Court for hearing de novo pursuant to 8 U.S.C. 1105a(a)(5). The Court of Appeals, with Judge Hufstedler dissenting, rejected petitioner's request for transfer of the proceedings and affirmed the decision of the Board of Immigration Appeals (Appendix A).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 8 U.S.C. 1105a(a)(5).

Section 1105a(a)(5) of Title 8 provides that a nonfrivolous claim to United States citizenship which presents a "genuine issue of material fact" entitles the claimant to a de novo hearing on the issue of nationality before a United States District Court. Prior to enactment of the statute,[*] this Court held that a claimant to citizenship had a constitutional

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[*] 75 Stat. 651 (1961).

right to a judicial trial on the issue of nationality if the evidence produced at his administrative hearing was sufficient, if believed, to support a finding of citizenship. *Ng Fung Ho v. White,* 259 U.S. 276 (1922); *United States ex rel. Bilokumsky v. Tod,* 263 U.S. 149 (1923). This Court's rationale for divesting the executive department of jurisdiction to pass on a colorable claim to citizenship and requiring that such a claim be tried in the district court was the difference in security of judicial over administrative action.

Although this Court has had no occasion to interpret 8 U.S.C. 1105a(a)(5), those courts of appeals that have dealt with the statute have uniformly held that it mandates transfer of the proceedings to a district court where the evidence on the issue of citizenship is conflicting and sufficient evidence, if believed, has been presented by the petitioner to establish his claim. *Pignatello v. Attorney General,* 350 F.2d 719 (2d Cir., 1965); *Tanaka v. INS,* 346 F.2d 438 (2d Cir., 1965); *Maroon v. INS,* 364 F.2d 982 (8th Cir., 1966); *Jolley v. INS,* 441 F.2d 1245 (5th Cir., 1971); *Olvera v. INS,* 504 F.2d 1372 (5th Cir., 1974); *Rassano v. INS,* 377 F.2d 971 (7th Cir., 1967). All of these cases stand for the proposition that transfer under the statute can only be denied where an assertion of citizenship is unsupported or where the facts are undisputed, and considered in the light most favorable to the claimant, fail to support a finding of citizenship. In such an instance, denial of transfer has been equated to a grant of summary judgment for the government.

Reference to the standard set forth in *Kessler v. Strecker,* 307 U.S. 22 (1939), decided prior to enactment of 8 U.S.C. 1105a(a)(5), suggests that the court below perceived its duty under the statute to include weighing the petitioner's evidence, since *Kessler,* by way of dictum, alluded to the requirement that a petitioner "support his claim by *substantial* evidence * * *" 307 U.S. at 35 (emphasis supplied). Further, as the dissent points out, the majority of the panel undertook to determine the credibility of petitioner's evidence, a function clearly not assigned to the courts of appeals by the statute. All other courts of appeals that have interpreted the statute have limited their role to ascertaining whether the evidence produced at the administrative hearing presents a "genuine issue of material fact as to the petitioner's nationality." See *Pignatello v. Attorney General,* supra; *Tanaka v. INS,* supra; *Maroon v. INS,* supra; *Jolley v. INS,* supra; *Olvera v. INS,* supra; *Rassano v. INS,* supra.

The decision of the Board of Immigration Appeals, the agency charged with making a final administrative determination of the petitioner's immigration status, leaves no room for doubt that petitioner's evidence presented genuine issues of material fact. The Board found that:

> If believed, the testimony of the Pianettis and of Carmen Ripolino clearly refutes the Service's otherwise strong documentary demonstration of the [petitioner's] alienage. (R. 4).

With respect to the issue of credibility, the Board followed the familiar principle of deferring to the

immigration judge, who is in the best position, as the administrative trier of fact, to judge the veracity of petitioner's witnesses (R. 4). Hence, the decision of the court below deprives petitioner of a judicial trial provided by the statute, and sanctions final resolution of his claim to citizenship, where credibility was the determinative factor, to a hearing officer in the executive department.

In a situation virtually identical to that in the present case, in that the determinative factor involved the issue of credibility, the Second Circuit liberally construed the statute as requiring solely the presentation of a nonfrivolous claim to citizenship. Ordering the proceedings transferred to the district court, the Court stated:

> Thus what Section 106(a)(5) requires, as a condition of a *de novo* judicial determination of the claim of citizenship, is nothing more than the claim not be frivolous. Petitioner's claim of citizenship can hardly be classified as frivolous, and the Board of Immigration Appeals in its decision denying a reopening of the deportation proceedings did not take a contrary view. It merely reasoned, quite correctly, that this administrative relief was not a prerequisite to obtaining the judicial determination.
>
> * * *
>
> Petitioner's claim of citizenship involves delicate issues of credibility that could only be resolved with the benefit of live testimony and a more complete documentary record.

Pignatello v. Attorney General, 350 F.2d 719, 723.

Indeed, the decision below marks the Ninth Circuit Court of Appeals as the only court which has denied

transfer under the statute where the administrative decision turned on the question of the credibility of petitioner's witnesses. Other courts have consistently confined their review of the administrative record to determining whether the petitioner had presented evidence, sufficient if believed, to entitle him to a finding of citizenship. In the instant case, the proper scope of review does not go beyond a reading of the decision of the Board of Immigration Appeals, which clearly indicated that petitioner had presented a colorable claim to citizenship. By extension of its review to include weighing the evidence and determining its credibility, the court below has contravened the intention of Congress when it codified the procedure for effectuating the constitutional principle enunciated in *Ng Fung Ho v. White,* supra. Furthermore, its decision is in direct conflict with the decisions of all other courts of appeals that have construed 8 U.S.C. 1105a(a)(5). Said conflict justifies the grant of certiorari to review the judgment below.

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2. THE DECISION BELOW RAISES AN IMPORTANT QUESTION CONCERNING PROCEDURAL RIGHTS TO BE ACCORDED A CLAIMANT TO UNITED STATES CITIZENSHIP.

The decision below, if allowed to stand, would most certainly have a chilling effect on the administration of our immigration laws, since it authorizes the executive department to strip away citizenship without according the claimant his constitutional and statutory rights to a judicial trial. Such a decision flies in the face of the traditional concern courts have displayed in safeguarding the precious right to Amer-

ican citizenship. *United States v. Minker,* 350 U.S. 179 (1956); *Nishikawa v. Dulles,* 356 U.S. 129 (1958).

The decision below deserves review by this Court because of the important question it raises concerning the procedural rights of a claimant to citizenship. We submit that it would be appropriate for this Court to grant certiorari and consider, for the first time, the proper interpretation to be given to 8 U.S.C. 1105a(a)(5).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
April 7, 1977.

Respectfully submitted,

ROBERT S. BIXBY,
FALLON, HARGREAVES, BIXBY & MCVEY,
OSCAR B. GOODMAN,
GOODMAN AND SNYDER,
Attorneys for Petitioner.

(Appendices Follow)

Appendices

Appendix A

DO NOT PUBLISH

United States Court of Appeals
for the Ninth Circuit

No. 75-2028

Joseph V. Agosto, Petitioner,

vs.

Immigration and Naturalization Service, Respondent.

[January 24, 1977]

Petition to Review an Order of Deportation Issued by the Board of Immigration Appeals

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MEMORANDUM

Before: HUFSTEDLER, SNEED and KENNEDY, Circuit Judges.

Petitioner Joseph V. Agosto seeks review pursuant to 8 U.S.C. § 1105a of an affirmance by the Board of Immigration Appeals of an order for his deportation issued by an immigration judge. He claims that he has presented a "genuine issue of material fact as to [his] nationality" which entitles him to a de novo hearing on this issue in the district court. 8 U.S.C.

§ 1105a(a)(5). The evidence presented to the immigration judge does not disclose a colorable claim to United States nationality; nor does it meet the standard set forth in *Kessler v. Strecker,* 307 U.S. 22, 35 (1939).

AFFIRMED.

HUFSTEDLER, Circuit Judge, dissenting:

If our function in reviewing this record were to determine the credibility of petitioner's evidence, I would agree with my brothers. As a fact finder, I, too, would not have credited the testimony presented by petitioner. I dissent for the sole reason that I do not believe our legally assigned role includes a decision on credibility, and, on that basis, I am unable to say that petitioner's evidence, if believed, would not present a colorable claim to American citizenship.

United States Court of Appeals
for the Ninth Circuit

No. 75-2028

Joseph V. Agosto,	Petitioner,
vs.	
Immigration and Naturalization Service,	Respondent.

[Filed Mar. 23, 1977]

ORDER

Before: HUFSTEDLER, SNEED and KENNEDY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and stay of mandate, and have voted to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing and stay of mandate, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Dated: March 18, 1977.

Appendix B

(Letterhead of
United States Department of Justice
Board of Immigration Appeals
Washington, D. C. 20530)

Apr. 4, 1975

File: A17 038 159—Seattle

In re: Vincenzo *Pianetti* aka Vincenzo Di Paola or Joseph Vincent Agosto

In Deportation Proceedings

Certification

On Behalf of Respondent: Robert S. Bixby, Esq.
30 Hotaling Place
San Francisco, CA 94111
Robert G. Karr, Esq.
9615 Bridgeport Way, S.W.
Tacoma, Washington 98402

On Behalf of I&N Service: David L. Milhollan
Appellate Trial Attorney

Oral Argument: October 30, 1973

Charges:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2))—Entry without inspection

Lodged: Sec. 241(a)(1), I&N Act (8 U.S.C. 1251 (a)(1))—Excludable at entry, convicted of a crime involving moral turpitude

Application: Termination, adjustment of status under section 245, suspension of deportation under section 244(a), waiver of inadmissibility under section 212(h), voluntary departure

In a decision dated April 11, 1973, the immigration judge ordered the respondent deported to Italy, but certified his decision to us pursuant to our order of July 12, 1971. The immigration judge's decision will be affirmed.

ALIENAGE

The fundamental issue in this case concerns the respondent's citizenship. The Service alleges that the respondent was born of unknown parents in Italy, that he was placed in a foundling home, and that shortly thereafter he was entrusted to the care of a childless couple who subsequently "affiliated" him under Italian law. The respondent, however, claims that he was born in the United States in 1924, and that his natural mother sent him to Italy at age two or three where he resided with relatives during his youth.

The Service's case is largely documentary in nature. Counsel attacks that case, contending that most of the Italian records showing the respondent to have been born in Italy in 1927 are themselves founded on one erroneous record, which was "created" in an effort to conceal certain aspects of the respondent's birth.

We find, however, that the Service's case is predicated on three records made approximately at the time of the respondent's birth. These three records appear to have been made separately and to have involved various persons who would have been able to determine whether they were dealing with a newborn infant or with a child of two or three years.

Exhibit 64 is a copy of an entry in the Registry of Births for the City of Agrigento, Italy, for the year

1927. It indicates that the respondent was born on July 17, 1927, of a woman who did not wish to be named, and that he was sent to a foundling home in the custody of the person who declared his birth before the registrar. See also Exhibit 4.

Exhibit 65 is a recitation of an annotation which appears in the records of a foundling home located in the same city of Agrigento. That record indicates that the respondent may have been born on July 16 and not July 17, 1927. However, the record does show that he was placed in the foundling home and subsequently entrusted to the woman who later affiliated him.

Exhibit 22 is a recitation from the records of that foundling home indicating that the respondent was baptized on July 18, 1927, two days after his actual birth and one day after the date on which the Civil Registry of Agrigento shows him to have been born.

The respondent concedes that these as well as other Italian records relate to him. He asserts, however, that these records were "created" by his influential maternal grandfather in an effort to conceal the fact that one of the grandfather's daughters had given birth to an illegitimate child in the United States.

The respondent produced three witnesses other than himself who testified in direct support of his claim to United States citizenship. The testimony of the persons who affiliated him in Italy directly contradicts the accuracy of the Service's documentary case, and the assertions of the respondent's alleged half brother comport with the respondent's view of his birth.

Mr. and Mrs. Pianetti affiliated the respondent in Italy in either 1943 or 1944 (see Ex. 31). They both testified several times during the course of the hearing. The translated Italian documents in the record indicate that Mrs. Pianetti is the woman who took the respondent from the foundling home less than two months after his birth. She, however, categorically denied any such occurrence, and asserted that the respondent was the natural child of her sister and was born in the United States.

Her husband, Mr. Pietro Pianetti, confirmed this account, and testified that he and the respondent's maternal grandfather journeyed to Palermo, Italy, in 1927 to meet the respondent who was then arriving by ship from the United States. The respondent was supposed to have been between the ages of two and three years upon his arrival in Italy.

The respondent has been unable to present any official or unofficial documentary evidence in support of his claimed birth in the United States. He did, however, produce a United States citizen witness whose mother appears to have been the same person the respondent claims was his natural mother.

This witness, Carmen Ripolino, testified that he was born in September of 1925, and that he was raised with a brother who was born in August of 1923. The witness asserted that his mother, who died in 1937, had informed him that she had had a third son born in the United States, but who had been sent to Italy at an early age.

If believed, the testimony of the Pianettis and of Carmen Ripolino clearly refutes the Service's otherwise strong documentary demonstration of the respondent's alienage. The immigration judge, however, found the Pianettis not to be credible witnesses, and he concluded that they were coached as to their testimony (immigration judge's opinion pp. 17-18).

The immigration judge was in the best postion to judge the veracity of these witnesses, who have close personal relationships to the respondent. Counsel for the respondent accurately asserts that the immigration judge's opinion does not fully reflect the potential import of the testimony of Carmen Ripolino, and that the immigration judge evidently misread part of the testimony of Mr. and Mr. Pianetti. However, we cannot agree with counsel in his contention that the immigration judge failed to comprehend the changes in the respondent's claimed date of birth. Rather, in his decision the immigration judge appears to have attempted to confront all the various claims made by the respondent during the course of these proceedings (see immigration judge's opinion p. 2). Our review of the record convinces us that the immigration judge was correct, and that no error has resulted from the immigration judge's apparent misreading of certain testimony.

It is not beyond the realm of possibility that the respondent's claim to United States citizenship is legitimate. However, in order for us to accept the respondent's version of his birth, as presented by the witnesses he produced and as indicated by the other

evidence of record, we would be required to find: (1) that the respondent's natural father was Salvatore Agosto (Tr. pp. 305, 340); (2) that Salvatore Agosto fathered a child born in 1921 in Cleveland, Ohio, whose name was Joseph, or Giuseppe, Agosto (Exs. 2 & 3), but that this child was *not* the respondent; (3) that the respondent's mother gave birth to a son in Akron, Ohio, in August of 1923 (Tr. p. 392), and that the father of this child was Giacomo Ripolino and not the father of the respondent (Tr. p. 395); (4) that the respondent's mother next gave birth to the respondent in August of 1924, one year later, in Cleveland, Ohio (Tr. p. 514); (5) that she knew the father of the respondent to be Salvatore Agosto (see Tr. 305, 340) and named the respondent Joseph or Joe Agosto, the same name that was given to an earlier child of the respondent's father (Tr. p. 482); (6) that the respondent's mother again began living in the same household as Giacomo Ripolino, and gave birth to a third son in Akron, Ohio, another year later in September of 1925 (Exs. 60 & 61; Tr. p. 399); (7) that the respondent's mother had him baptized in the United States (Tr. pp. 355-57); (8) that the respondent, who can afford to send an investigator to Italy to search records (Tr. pp. 425-26), has not been able to produce a certificate of his United States baptism, even though he ostensibly knows the name under which he would have been baptized and the general vicinity of Ohio in which the baptism likely would have occurred.

Furthermore, the only direct evidence in support of the respondent's position comes from persons with

family ties to the respondent. There is not only a conspicuous absence of documentary support for the respondent's claim, but also an absence of evidence from disinterested persons.

Counsel for the respondent relies on the respondent's Italian marriage in 1944 to a 23-year-old schoolteacher as further evidence that the respondent could not have been born in July of 1927. Counsel argues that it is quite unlikely that a 23-year-old woman would marry a 17-year-old boy given the strict standards then prevailing in a small Roman Catholic community in Italy. Counsel, however, ignores the respondent's sworn pleading in a declaratory judgment action in the state of Washington in which the respondent sought to have his present marriage declared valid (see Ex. 44). The schoolteacher had evidently been tutoring the respondent and had become pregnant, thus necessitating the marriage.

During the course of this proceeding, the respondent has demonstrated considerable flexibility in adapting his story to the Service's proof. His date of birth, as he has alleged or as has been alleged by his witnesses, has fluctuated from 1921 (Tr. pp. 11, 68), to 1925 (Tr. pp. 295, 343), to 1924 (Tr. pp. 483, 514). Nevertheless, in his court action seeking a declaration as to the validity of his present marriage, he was quite willing to let the court believe him to have been 17 at the time of his marriage in Italy (see Exs. 43 & 44). This court action was undertaken at a time when the respondent was making a substantially different claim before the immigration judge.

We find that the Service's case as to alienage is clear, convincing and unequivocal. The respondent is an alien, born in Italy in July of 1927. He is properly the subject of this deportation proceeding.

DEPORTABILITY

The immigration judge found the respondent deportable as an alien who had entered without inspection, and as an alien who was excludable at entry for having been convicted of crimes involving moral turpitude. On appeal, counsel does not challenge these findings, except as to the underlying fact of alienage.

We have decided the question of alienage against the respondent. Furthermore, our review of the record convinces us that the immigration judge was correct in his conclusions with respect to deportability.

RELIEF FROM DEPORTATION

During the course of the proceedings below, the respondent sought various forms of relief from deportation, all of which were denied by the immigration judge. On appeal, the respondent only contests the immigration judge's rulings as to relief under section 245, section 244(a), and section 244(e).

The immigration judge found that the respondent had entered the United States under a willfully false claim to United States citizenship. The immigration judge therefore concluded that the respondent was statutorily ineligible for adjustment of status because

the respondent had not been "inspected and admitted or paroled" into the United States within the purview of section 245. The respondent contends that his claim to citizenship has always been asserted in good faith. He thus argues that he was "inspected" within the contemplation of section 245.

The respondent's claim to eligibility for relief under section 245 is predicated on his having believed the version of his birth which he presented during these proceedings. Such a good faith belief in major part depends on his having been told this version as a youth in Italy by the persons who "affiliated" him. This story, however, is so extraordinary that we have great difficulty believing that it would have been invented and told to an adolescent as the truth, when in fact it was not the truth. We have found the story to be a fabrication, and we also conclude that it was never told to the respondent during his youth. The respondent entered the United States under a knowingly false claim to citizenship, and he is statutorily ineligible for adjustment of status.

We also agree with the immigration judge's conclusion with respect to the respondent's applications for suspension of deportation and for voluntary departure. In order to be statutorily eligible for either form of relief, the respondent must establish that he has been a person of good moral character within the period prescribed for each type of relief. The respondent, however, knowingly gave false testimony before the immigration judge; his claim to citizenship has been knowingly false since its inception. He is

thus statutorily precluded from establishing the requisite good moral character by virtue of section 101(f)(6) of the Act.

The decision of the immigration judge was correct.

ORDER: The decision of the immigration judge is affirmed.

.....

Acting Chairman

Chairman David L. Milhollan abstained from consideration of this case.

APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1410

JOSEPH V. AGOSTO, *Petitioner*,

VS.

IMMIGRATION AND NATURALIZATION SERVICE,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed April 12, 1977
Certiorari Granted October 17, 1977

PERNAU-WALSH PRINTING CO. - 333 MISSION STREET - SAN FRANCISCO, CA 94105

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*Decision of the Board of Immigration Appeals dated April 4, 1975 appears as Appendix B to the Petition For Certiorari. Memorandum Decision of the Court of Appeals and Order of the Court of Appeals denying Petition For Rehearing appears as Appendix A to the Petition For Certiorari.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

May 7, 1975—Petitioner Agosto's Petition For Review of a Deportation Order of the Immigration and Naturalization Service and For Transfer To The United States District Court For Hearing de novo filed in U.S. Court of Appeals for the Ninth Circuit.

July 25, 1975—Filed Petitioner's Brief.

October 20, 1975—Filed Petitioner's Supplemental Brief.

January 6, 1976—Filed Respondent's Brief.

January 28, 1976—Filed Petitioner's Reply Brief.

April 19, 1976—Filed Petitioner's Supplemental Reply Brief.

January 19, 1977—Filed order pursuant to Rule 3a of the Rules of the Ninth Circuit, classifying this case as one in which the questions raised on appeal are, in the unanimous opinion of the panel, of such a nature that oral argument would not be of assistance. Therefore, the case is ordered submitted to the Court for decision without oral argument on January 24, 1977, in San Francisco, CA.

January 24, 1977—Ordered memorandum, Hufstedler dissenting, filed and judgment to be filed and entered.

January 24, 1977—Filed memorandum—affirmed.

January 24, 1977—Filed and entered judgment.

February 7, 1977—Filed Petition For Rehearing and Stay of Mandate, with suggestion for rehearing in banc.

March 23, 1977—Filed Order denying the petition for rehearing and rejecting the suggestion for rehearing in banc.

March 25, 1977—Filed Petitioner's Motion For Stay of Mandate.

March 30, 1977—Filed Order staying the issuance of the mandate to April 22, 1977.

United States Department of Justice
Immigration and Naturalization Service

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

File No.: A17 038 159

UNITED STATES OF AMERICA:

In the Matter of
Vincenzo Pianetti aka Joseph Vincent Agosto, Vincenzo Di Paola,
Respondent.

ORDER TO SHOW CAUSE AND NOTICE OF HEARING

To: Vincenzo Pianetti, 9190-MC (known as Joseph Vincent Agosto), U. S. Penitentiary, McNeil Island, Washington
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Italy and a citizen of Italy;
3. You entered the United States at an unknown port on or about December 11, 1966;
(date)

See Continuation Sheet attached hereto and made a part hereof.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Wherefore You Are Ordered to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at U. S. Penitentiary, McNeil Island, Washington on September 28, 1967 at 10:30 a.m., and show cause why you should not be deported from the United States on the charge(s) set forth above.

Immigration and Naturalization Service
John P. Boyd, District Director
(Signature and title of Issuing officer)

Seattle, Washington
(City and State)

Dated: September 5, 1967

Continuation Sheet

4. You then presented yourself for admission as Joseph Vincent AGOSTO, a citizen of the United States, and presented a United States passport in proof thereof;
5. You were not then a citizen of the United States;
6. You did not then present yourself for admission as an alien;
7. You were not inspected as an alien by a United States Immigration officer;
8. You have never been inspected and admitted to the United States as an alien;

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, you entered the United States without inspection.

United States Department of Justice
Immigration and Naturalization Service

File: A17-038-159—Seattle, Washington

In Deportation Proceedings

In the Matter of
Vincenzo Pianetti also known as Vincenzo Di Paola, or Joseph Vincent Agosto,
Respondent.

[April 19, 1968]

Charges:
I & N Act—Section 241(a)(2)—Entry without inspection.

Application: None.

In Behalf of Respondent:
Irving Clark, Jr., Attorney
334 Fairview Avenue North
Seattle, Washington 98109

In Behalf of Service:
B. G. Greenwald
Trial Attorney
Seattle, Wash.

DECISION OF THE SPECIAL INQUIRY OFFICER

The respondent is a 40 year old married male who is charged in the order to show cause with being an alien, a native and citizen of Italy, who entered the United States without being inspected as an alien

and therefore is deportable under the provisions of Section 241(a)(2) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(2)).

The respondent denies all the allegations in the order to show cause with the exception of Allegations 6, 7, and 8. He admits then that at the time of entry to the United States he did not present himself for admission as an alien, was not inspected as an alien, and that he has never been inspected and admitted to the United States as an alien. The burden of proof is on the Immigration Service to establish by clear, convincing and unequivocal evidence that the facts alleged as grounds for deportation are true[1].

The Government claims that the respondent is Vincenzo Di Paola Pianetti, a native of Italy and an alien. The respondent avers that although he used those names until about 1950, that he is in fact Joseph Agosto, a native of Cleveland, Ohio who was taken to Italy as a young boy.

The single issue in this case is one of identity. If the respondent prevails he is a citizen of the United States and the Government has no jurisdiction in deportation proceedings, since deportation proceedings are limited to aliens, persons who are not citizens or nationals of the United States[2]. If the Service prevails the respondent is an alien and is by his own admission one who entered the United States without inspection and as such is deportable.

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[1] *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 87 S.Ct. 483, 17 L. Ed. 2d 362, December 12, 1966.

[2] Section 101(a)(3), Act of 1952, 8 U.S.C. 1101(a)(3).

The record is extensive, containing numerous documentary exhibits, the testimony of the respondent and the testimony of one witness. Succinctly, the facts emerge as follows: the respondent was born of undisclosed parents at Agrigento, Sicily, Italy, July 17, 1927. He was entrusted to the care of the Porrello family as an infant and at age fifteen he was put under their guardianship by order of the court and given the name Vincenzo Pianetti. Prior to that time, as was the custom with persons of unknown parentage, they were given the name of the saint whose feast day fell on the date of their birth, consequently the respondent was named for St. Vincent de Paul and was called Vincenzo Di Paola. Pianetti was married at the age of seventeen. He acquired a police record and was convicted on several occasions. In October 1951 he was convicted and sentenced to imprisonment and the sentence was suspended for five years. A month later he obtained an Italian passport and a visa to enter Canada as a visitor. No record of his admission to the United States is available. The only evidence is his testimony that he entered from Mexico, which according to his recollection was about 1950, and that at that time he presented a copy of a delayed birth certificate relating to Giuseppe Agosto, born at Cleveland, Ohio August 30, 1921, furnished to him by an uncle who had told him that it related to his birth. With this certificate he obtained a United States citizen passport and has since been known by the name of Joseph Agosto.

Although the respondent maintained that his origin was a mystery, the Government presented evidence

from the Provincial Institute of Assistance to Infancy, Agrigento, Sicily, Italy (Ex. 22) showing that their records disclosed the birth of Vincenzo Di Paola on July 16, 1927 at 4:00 A.M., and showing him to have been baptized on July 18, 1927. There is a record to show that the civil registry of births of Agrigento shows this infant, for official purposes, to have been born on July 17, 1927, according to Act #461. The records of that Provincial Institute further show that Vincenzo Di Paola was affiliated April 15, 1943 by the couple Pietro Pianetti and Crocifissa Porrello. This document is labelled a certificate of baptism. The respondent testified (p. 71) that he had the name Vincenzo Di Paola at birth because he was declared in the Municipality of Agrigento on the 17th or 19th of July, and it was the Feast of St. Vincent De Paul and "they gave me that name because I was of unknown parentage", and that in order to proceed with the affiliation or adoption by the Pianetti's the name was imposed on him; that he used the name Di Paola for a while and the name Pianetti, the latter after he was affiliated or under the guardianship of the Pianetti's (tr., pp. 70-71).

Exhibit 22 standing alone would not be conclusive, but when viewed in the light of all the respondent's testimony and the numerous foreign records,[5] the respondent's origin and identity are not in doubt.

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[5]Authenticated or certified foreign documents are admissible in evidence. *Ventura v. Shaughnessy*, 219 F. 2d 249. Even if not authenticated or certified they may have probative value if uncontradicted. *Smith v. Curran*, 12 F. 2d 636; *Impasto v. O'Rourke*, 211 F. 2d 609, 8th Circuit, 1953, cert. den. 348 U.S. 827; *Williams v. Mulcahey*, 250 F. 2d 127, 6th Circuit, cert. den. 356 U.S. 946.

Exhibit 20 recites that according to the records of the Istituto Provinciale di Assistenza all'Infanzia (Provincial Institute of Assistance to Infancy), Vincenzo Di Paola was entrusted to the care of Mr. and Mrs. Pietro Pianetti one month after birth and formally affiliated in 1943. The fact that this shows the respondent's origin is recorded in the Municipality of Agrigento, Bureau of Civil Registry, according to Exhibit 4, which is entitled "Birth Certificate—Vincenzo Di Paola". This document, which is accompanied by an English translation, is a certified copy of records of that government agency in Italy and contains the stamp of the Attorney General for the Republic, and the signature of the registrar is authenticated by that official, and the American Consul at Palermo certified to his official signature and character. This document recites that Vincenzo Di Paola was born July 17, 1927 at Agrigento; that he was affiliated by Pietro Pianetti and Crocifissa Porrello and given the name Vincenzo Pianetti by order of the Surrogate in Licata on April 15, 1943; and that it was entered in the records of birth of the municipality. It further stated that this same Vincenzo Pianetti, who presented a copy of his birth certificate on November 19, 1944 was married at Palermo to Anna Pasqua Vince Vicis, and that the official records in the custodianship case of Vincenzo Pianetti were opened upon official request October 24, 1968. This document also contains the statement of the Attorney General attached to the Court of Appeals at Palermo that he had verified the signature of the registrar of

the Civil Registry at Agrigento, and the document is endorsed by the American Consul to show that the custodian of the records occupies that official position.

Exhibit 5 is a birth certificate of Vincenzo Pianetti as shown by the records of the registrar of the Civil Registry for the Municipality of Agrigento, and the signature of the registrar of the Civil Registry is authenticated by the Assistant Attorney General for Palermo and the Ministry of Foreign Affairs in Rome authenticated the signature of the Assistant Attorney General. The American Consul in turn certified to the signature of the Ministry of Foreign Affairs.

Exhibit 6, an English translation of the records of the Municipality of Palermo, is an extract from the registers of marriage records reciting that Vincenzo Pianetti, age seventeen, of Pietro and Crocifissa Porrello, born in Agrigento, married Anna Pasqua Vices Vinci, age twenty three, a native of Naples, on November 19, 1944. The signature of the custodian of the records is authenticated by the Attorney General for the Republic attached to the Court of Appeals in Rome, whose signature in turn is authenticated by the Ministry of Foreign Affairs, and there is attached a certificate by the American Consul certifying to the signature of the Minister of Foreign Affairs.

Similarly authenticated is Exhibit 7, showing the family status of the respondent's wife, Anna Vices Vince, showing her to be married to Vincenzo Pianetti, showing the birth of a daughter Flora and a daughter Gioconda Crocetta in 1945 and 1946, respectively.

There was introduced into evidence an affidavit of the respondent's wife, Anna Vices Vinci, identifying the photograph of Vincenzo Pianetti, the respondent, acknowledging that she was married to him as the records show, and that he is the same Vincenzo Pianetti born in Agrigento, Italy July 17, 1927, the son of Pietro and Crocifissa Porrello (Ex. 9).

Exhibit 10 is an affidavit of the respondent's daughter, Crocetta Gioconda Pianetti, identifying the photograph as Vincenzo Pianetti who she last saw in Anchorage, Alaska. That affidavit is dated July 14, 1967. The respondent testified that he was married to Anna Vinci Vices as the records show and that he had two daughters named as shown by the records, and that his daughters had visited him at Anchorage and Seattle.

Exhibit 12 is a criminal record and order of incarceration of a person sentenced. It recites the date and place of the respondent's birth and is authenticated by the Attorney General's office in Italy and certified by the Ministry of Foreign Affairs whose signature is in turn authenticated or certified by the American Consul.

Exhibit 11 is a record from the police headquarters at Agrigento which contains entries relating to the criminal record of Vincenzo Pianetti and states the date and place of his birth. It is authenticated in the same manner as the previous documents, by the Attorney General's office, the Ministry of Foreign Affairs, and the American Consul.

The respondent was given an opportunity to test this evidence by depositions but did not avail himself of the opportunity. The respondent has presented no credible evidence to show that he is not the person whom the Government claims him to be. He presented his Social Security records showing that his earnings commenced in 1951 (Ex. 28). Exhibit 29 is a certificate of marriage evidencing the fact that he was married July 28, 1953 at Anchorage, Alaska to Leota Estelle Richards. He entered into this marriage under the name of Joseph Agosto and it is noted that the exhibit shows that he was married in the Catholic Church and that he had no previous marriages. The church authorities were evidently unaware of the fact that he had previously been married in Italy as Vincenzo Pianetti, because Exhibit 30, a baptismal certificate of Joseph Agosto, shows that it was obtained for the purpose of establishing his baptism for church authorities. Although this evidence has no bearing upon his identity, it does not commend him for his veracity.

The respondent introduced into evidence as Exhibit 31 a statement from the Bureau of Vital Statistics of the Municipality of Agrigento, Sicily, Italy dated August 4, 1967, the first paragraph of which recites that in the registers of births in that municipality from 1921 to 1927 there is no registration of a birth of one Vincenzo Pianetti, the son of Pietro and Crocifissa Porrello. Based upon the evidence introduced by the Government this would appear to be quite obvious as the birth register shows, as is ex-

plained in Paragraph 2 of the exhibit, that Pianetti's birth was registered in the name of one Vincenzo Di Paola, of unknown parents, all of which is consistent with the testimony of the respondent referred to above. The respondent also introduced as Exhibit 33 a statement from the Registrar of Vital Statistics at Licata, Italy stating the manner in which the Bureau of Vital Statistics registers orphans. This would appear to have no application to the respondent's case as it has been established that his birth was registered at Agrigento.

The other evidence the respondent presented was a birth certificate of Giuseppe Agosto, or Joseph Agosto, whose name he is now using. This is identified as Exhibit 24. It is a copy of a delayed birth certificate of Joseph Agosto. There is nothing to identify the respondent with this birth certificate except his self-serving testimony that it was mailed to him by an uncle, since deceased, in about 1948 or thereafter. The Government, on the other hand, has presented evidence from Joseph Agosto's sister, who still resides in Italy (Ex. 13), stating that the person who the respondent claims to be died in Licata, Italy on December 14, 1951. Exhibit 14 is a record from the Municipality of Licata, Province of Agrigento, confirming that testimony. It is a record of death of Giuseppe Agosto.

All of the foregoing evidence identifies the respondent as Vincenzo Di Paola and later Vincenzo Pianetti, who was born in 1927 in Agrigento, Sicily, Italy, and who maintained that identity for twenty five years

until he came to the United States in 1951 or early 1952. Although he has had ample opportunity, he has presented no credible evidence that he is Joseph Agosto born in Cleveland, Ohio in 1921. The Government has presented records of the State Department relating to Giuseppe Agosto or Joseph Agosto in connection with passport applications and an adjudication of citizenship, which clearly shows that he is not the same person as the respondent. It is clear from all the evidence that the respondent, after gaining entry to the United States under his identity, had passports issued to him in the false identity and passed himself off as a citizen of the United States.

The Government concedes that the Joseph Agosto who was born in Cleveland, Ohio returned to Italy as a child. Examination of the respondent concerning his early background resulted only in eliciting evasive answers about his early life in Italy, his schooling and other activities. It is inconceivable that he could concede that he was the Vincenzo Pianetti to whom all these records relate and still claim that he is also Joseph Agosto who was born in Cleveland, Ohio. The records presented here with respect to the lives of the two establish that they could not be one and the same person. Agosto was seven years older than the respondent. There is no record of his having married or having had children. He was a student. He had attempted to return to the United States but was refused a passport because it was felt that he may have lost his United States citizenship by his long residence in Italy. The respondent knew that this

passport had been refused and testified that for this reason he obtained the Italian passport to come to Canada in his own name because he knew if he applied for a passport at the American Consulate in Italy, at least in Palermo, he would be refused (tr., p. 45).

During the hearing the respondent maintained that his marriage in Italy had been annulled although other evidence in the record shows that he had merely obtained a legal separation. He presented what he referred to as a copy of the decree of annulment in the Italian language. The document was excluded because he did not present an English translation. Although he declared during the hearing that the document together with the English translation would be presented, the evidence was not forthcoming. He also testified that he had obtained a divorce in Mexico from his Italian wife prior to his marriage in Alaska. He was unable to furnish a copy of a divorce decree and promised that such evidence would be forthcoming and it was not presented. Although he and his wife testified that they were married, no documentary evidence of this union was presented in evidence. The respondent was given an opportunity to apply for discretionary relief from deportation and no application was presented within the time specified.

On the basis of all the evidence I find that the charge in the order to show cause has been sustained by clear, convincing and unequivocal evidence. The respondent has designated Italy as the country to which he wishes to go in the event he is deported from

the United States. Accordingly, an order of deportation to Italy will be entered.

ORDER: It is ordered that the respondent be deported from the United States to Italy on the charge contained in the order to show cause.

/s/ John W. Keane
John W. Keane
Special Inquiry Officer

United States Department of Justice
Board of Immigration Appeals

File: A-17038159—Seattle

In Deportation Proceedings

In re:
Vincenzo Pianetti aka Vincenzo Di Paola or Joseph Vincent Agosto

[Jul 25 1968]

Appeal

On Behalf of Respondent:
Irving Clark, Jr., Esq.
334 Fairview Avenue North
Seattle, Washington 98109
(Case scheduled for oral argument on June 26, 1968 but counsel did not appear; brief filed)

On Behalf of I&N Service:
C. B. Doughty
Regional Counsel
(Brief filed)

Charges:
Order: Section 241(a)(2), I&N Act (8 USC 1251 (a)(2))—Entry without inspection

Lodged: None

Respondent appeals from the order of the special inquiry officer requiring his deportation on the charge stated in the caption. The Regional Counsel, Northwest Regional Office filed a motion with the Board asking that if it affirms the finding of deportability it remand the case to the special inquiry officer with directions to reopen the deportation hearing to find if the respondent's marriage is valid, and if it is, whether he is nondeportable under 8 USC 1251(f) of the Act. The motion states that respondent's wife has filed a suit in the United States District Court, Western District of Washington, Southern Division, case No. 3728, for a declaration that the respondent is her lawful husband and that the two children of the union are legitimate.

We shall remand proceedings without reviewing the case on the merits. All the facts should be before us before a review on the merits is made.

ORDER: It is ordered that the case be returned to the special inquiry officer for further proceedings not inconsistent with we have stated in our discussion.

It Is Further Ordered that the order of the special inquiry officer be certified to the Board.

/s/ Thos. G. Finucane
Chairman

United States Department of Justice
Immigration and Naturalization Service

UNITED STATES OF AMERICA:

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

File No. A17038159

In the Matter of
Vincenzo Pianetti, aka Vincenzo di Pietro Pianetti, aka Joseph V. Agosto,
Respondent.

ADDITIONAL CHARGES OF DEPORTABILITY

To: Mr. Vincenzo Pianetti
(name)

.....
(address)

There is hereby lodged against you the additional charge(s) that you are subject to be taken into custody and deported pursuant to the following provision(s) of law:

Section 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who have been convicted of a crime involving moral turpitude, under sec. 212(a)(9) of the act, to wit: forgery, fraud, and false statement in Federal Housing Administration Transaction.

In support of the additional charge(s) there is submitted the following factual allegation(s) in addition to those set forth in the order to show cause and notice of hearing:

9. You were convicted in the Criminal Court of Trapani, (Italy) August 23, 1949, for the crime of fraud, which sentence was affirmed by the Court of Appeals of Palermo, Italy, Nov. 24, 1951.
10. You were convicted in the Criminal Court of Palermo, (Italy) on Nov. 8, 1947, for the crimes of forgery and fraud, which sentence was modified and affirmed by the Court of Appeals of Palermo, Italy, July 17, 1948.
11. You were convicted in the United States District Court for the District of Alaska, October 17, 1966, of knowingly and willfully causing to be made, passed and altered, a false statement in violation of Title 13, U.S.C. Sec. 1010.

Aug. 29, 1968
(Date)
B. G. Greenwald
Trial Attorney
U.S.I.N.S.
Seattle, Wash.

United States Department of Justice
Immigration and Naturalization Service

File: A17 038 159—Seattle, Washington

In Deportation Proceedings

In the Matter of
Vincenzo Pianetti also known as Vincenzo Di Paola or Joseph Vincent Agosto
Respondent

[Apr 11 1973]

Charges:

Order:
Sec. 241(a)(2), I & N Act [8 U.S.C.A. 1251(a)(2)]—Entry without inspection.

Lodged:
Sec. 241(a)(1), I & N Act [8 U.S.C. 1251(a)(1)]—Alien excludable at entry, convicted of a crime involving moral turpitude.

Application:
Section 245, I & N Act [8 U.S.C. 1255], adjustment of status to permanent resident; Section 212(h), I & N Act, waiver of excludability, crime involving moral turpitude prior to entry; Section 212(i), I & N Act, waiver of excludability for procuring entry by fraud or misrepresentation; Section 244(a), I & N Act, suspension of deportation; Section 241(f), I & N Act, nondeportable for misrepresentations at entry because of quali-

fying United States citizen relatives; Section 244(e), I & N Act, voluntary departure in lieu of deportation: Section 243(h), I & N Act, temporary withholding of deportation because of persecution if returned to Italy to face bigamy charge.

In Behalf of Respondent:

Robert S. Bixby, Esq.
30 Hotaling Place
San Francisco, California 94111
Robert G. Kerr, Esq.
9615 Bridgeport Way, S. W.
Tacoma, Washington 98402

In Behalf of Service:

B. G. Greenwald
Trial Attorney
Seattle, Washington

DECISION OF THE UNITED STATES IMMIGRATION JUDGE

This is a deportation proceeding under the provisions of Section 242 of the Immigration and Nationality Act of 1952, as amended (8 U.S.C.A. 1252) and implementing regulations, 8 C.F.R. 242.

The respondent is a 45-year old married male, a native and citizen of Italy. There are three primary issues concerning the question of deportability. First, the jurisdictional issue of the respondent's identity as an alien, Vincenzo Pianetta aka Vincenzo Di Paola, a native of Italy, or Joseph Agosto, the son of Arcangelo Agosto and Carmella Todaro, a native of

Cleveland, Ohio, and, therefore, a citizen of the United States, or Joseph Agosto, the son of Angelica Porrello and an unknown father, born in Ohio about 1924 or 1925 and brought to Italy at age 2½. If his claim to citizenship should prevail, the United States Immigration Service has no jurisdiction and the proceedings should be terminated.

Secondly, if he is found to be Vincenzo Pianetti, he is an alien. The Service has jurisdiction and has the burden of establishing by clear, convincing and unequivocal evidence that the facts in the Order to Show Cause are sufficient in law to sustain an order of deportability.[1] The facts and charges in this proceeding have been alleged in the Order to Show Cause[2] and in a lodged charge[3] during the hearing.[4]

The United States Immigration Service charges the respondent with being deportable under the provisions of Section 241(a)(2) of the Immigration and Nationality Act of 1952 as an alien who entered the United States without inspection by a United States Immigration Officer and under the provisions of Section 241(a)(1), Immigration and Nationality Act [8 U.S.C. 1251(a)(1)], as an alien who was excludable at entry under the provisions of Section 212(a)(9) [8 U.S.C. 1182(a)(9)], an alien convicted of a crime involving moral turpitude.

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[1] *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 87 S.Ct. 483, 17 L. Ed. 2d 362 (December 12, 1966).

[2] Exhibit No. 1, Transcript page 4.

[3] Exhibit No. 35, Transcript page 140.

[4] 8 C.F.R. 242.16(d).

The respondent has applied for ancillary relief from deportation under Section 245 of the Immigration and Nationality Act to become a permanent resident alien, together with a waiver of excludability under the provisions of Section 212(h) because of conviction of a crime involving moral turpitude prior to entry, and under the provisions of Section 212(i) for procuring entry by fraud or misrepresentation since he is the spouse of a United States citizen and parent of a United States citizen child and, therefore, eligible for an immigrant visa. This, as well as other relief requested herein, is discretionary with the Attorney General, except nondeportability under Section 241(f).

He also seeks suspension of deportation under the provisions of Section 244(a) of the Immigration and Nationality Act and a finding that he is within a nondeportable class of aliens under the provisions of Section 241(f) of the Immigration and Nationality Act because of his qualifying United States citizen relatives and his fraud or misrepresentation at the time of entry. In lieu of the foregoing, he also requests voluntary departure without an order of deportation under the provisions of Section 244(e) of the Immigration and Nationality Act. As a last resort, he requests a temporary withholding of deportation under the provisions of Section 243(h) of the Immigration and Nationality Act, as amended, on the claim that he would be persecuted if he were to return to Italy since he is wanted there as a fugitive from justice and for possible prosecution for bigamy.

Each of these issues will be considered seriatim following a brief historical background of the case.

The proceeding was commenced by the issuance of a warrant of arrest and on September 5, 1967, of an Order to Show Cause and Notice of Hearing. The respondent was then in the Federal Penitentiary at McNeil Island. Following his release from the Pententiary, he came into the custody of the United States Immigration Service. The first hearing was had in the Pierce County Jail, Tacoma, Washington. The respondent was then detained in lieu of a $7,500 appearance bond. He could not raise the money for this bond and his attorney appealed for a reduction which the District Director granted and he was released from custody.

Deportability has been decided in this case by a written decision of the Special Inquiry Officer on two occasions. Each time the Board of Immigration Appeals has returned the case to the Special Inquiry Officer for further hearing to consider additional evidence and to allow the respondent to apply for additional discretionary relief.

The jurisdictional question of whether the respondent is a citizen of the United States has never been decided by the Board of Immigration Appeals. The delay in returning the case to the Board of Immigration Appeals is the result of a protracted investigation conducted by the Investigations Division of the United States Immigration and Naturalization Service as a result of his multiple applications for discretionary relief from deportation.

The first question to be resolved is one of identity. Who is the respondent? The United States Immigration and Naturalization Service claims he is Vincenzo Di Paola Pianetti, born in the City of Agrigento, a city on the southern coast of Sicily.

Exhibit 65 is an Italian document with a certified translation, authenticated[5] through the Italian officials and the American Consulate,[6] November 26, 1971. This Italian record of the Province of Agrigento, Italy, certifies that in the Register for the Reception of Foundlings in the year 1927 of the Provincial Institute of Assistance to Infancy of Agrigento, the following entry, No. 104, appears:

> "July 16, 1927, 4:00 a.m., Vincenzo Di Paola, male, consigned on August 26, 1927, to Crocifissa Porrello, wife of Pietro Pianetti, from Sciacca, Railroad Station—Rosaria Ceraulo, Racalmuto—Born recently in good state of health."

The record did not say who consigned the child to the foster parents.

An Italian document (Ex. 64), translated into English, recites that on the 18th of July at 11:50 a.m. in the year 1927 at the City Hall before the official Registrar of the City of Agrigento, appeared a handywoman, a resident, who declared to the Regis-

[5]Authenticated or certified foreign documents are admissible in evidence, *Ventura v. Shaughnessy*, 219 F.2d 249. Even if not authenticated or certified they may have probative value if uncontradicted, *Smith v. Curran*, 12 F. 2d 636; *Impasto v. O'Rourke*, 211 F. 2d 609, 8th Circuit, 1953, cert. den. 348 U.S. 827; *Williams v. Mulcahey*, 250 F. 2d 127, 6th Circuit, cert. den. 356 U.S. 946.

[6]Italian documents authenticated on reverse.

trar that at 4:00 a.m. on the 17th of July in a house situated in Via Oblati, a male child was born of a woman, who does not want to be named; that the child was presented and given the name of Vincenzo and the surname of Di Paola. As witness to this entire compilation of the birth certificate, two male residents of the city were named. The child was sent to a foundling home in care of the declaring handywoman, Giuseppa Calleo, together with a copy of the document for the Mother Superior. The record was read to the people present, who signed in the presence of the Registrar that it was a true copy (record). It was declared to be a true copy of the original recorded document requested for the use of the American Consulate General at Palermo. There were marginal notes later recorded on the certificate that were translated into English, showing that Vincenzo Di Paola, the foundling, was affiliated by Pietro Pianetti and Crocifissa Porrello by a Judge in Licata, April 15, 1943, approved February 12, 1944, and recorded in the registry of births of 1944 in Agrigento, March 11, 1944. Another note shows that Vincenzo Di Paola now Pianetti was married to Vicis Vinci Anna Pasqua on November 19, 1944, in the City of Palermo.

Exhibit No. 4 is an extract and summary of a birth certificate for the year 1927, Part I, No. 461, dated September 22, 1967, relating to Vincenzo Di Paola. It is authenticated by the custodian of the records of the Civil Registrar of Agrigento and the signatures of the custodians and other officials are identified by the American Consul General in Palermo. It recites

that the records for the year 1927, referring to the part and number in Exhibit No. 64, previously described, show that Vincenzo Di Paola, male, born in Agrigento in Via Oblati, at 4:00 of July 17, 1927, was affiliated by the married couple of Pietro Pianetti and Crocifissa Porrello and was given the name of Vincenzo Pianetti by order of the Surrogate of Licata, and that Vincenzo Pianetti presented a copy of his birth certificate on November 19, 1944, when he was married in Palermo to Anna Pasqua Vinci Vicis.

Exhibit No. 5 is another record entitled "Birth Certificate, Bureau of Civil Registry, Municipality of Agrigento," signed by the Registrar of Vital Statistics, April 5, 1967, and authenticated by various Italian officials and the American Consulate, shows an examination of the same records, contains the same information relating to the birth and identity of Vincenzo Pianetti, born July 17, 1927.

Exhibit No. 6 is an extract from the Registers of Marriage Records for the Municipality of Palermo. This is an Italian document with an English translation, authenticated by the custodian of the Italian records together with the American Consulate General at Rome, Italy, describes that the Registers of Marriages for Palermo for the year 1944 shows that Vincenzo Pianetti of Pietro Pianetti and Crocifissa Porrello, 17 years of age, born in Agrigento, and Miss Anna Pasqua Vices Vinci, of Emanuele and Maria Di Leva, born in Naples, 23 years of age, were married November 19, 1944, and the record was made in accordance with the requirements of law.

Exhibit No. 7 is a record of the Municipality of Rome, Vital Statistics Department, relating to family status. It describes the family of the respondent's wife, showing that she was married to Vincenzo Pianetti in Palermo. It shows that a daughter, Flora Pianetti, was born in Palermo, October 30, 1946, and that another daughter, Crocetta Giocanda Pianetti, was born in Palermo, July 21, 1945.[7]

The foregoing is only part of the documentary evidence that identifies the respondent as Vincenzo Pianetti, an alien, and native of Italy. There is much more cumulative evidence, such as Exhibit No. 22, relating to the respondent's baptism several days after his birth, and his marriage certificate, Exhibit 23, together with records of his origin recited in criminal records to be referred to later in deciding another issue. (See Ex. 37, 38, 39, 50, 51, 52.)

It is clear from the entire record that the respondent when apprehended by the U.S. Immigration Service claimed to be Joseph Agosto, born at Cleveland, Ohio, August 30, 1921, son of Arcangelo Agosto and Carmela Todaro. As evidence of his claimed identity he presented a birth certificate of Giuseppe Agosto, whose name he is now using (See Ex. 3 and 24). This birth certificate was a delayed birth certificate registered with the Bureau of Vital Statistics, January 13, 1930, and the certified copy, issued by

[7] See the affidavit of the respondent's wife, Anna Vices Vici Pianetti, before the American Consul, July 14, 1967 (Ex. 9); sworn statement of his daughter, Crocetta Gioconda Pianetti (Ex. 10), all of which is corroborative of the Italian records and the identity of the respondent as Vincenzo Pianetti.

the Bureau of Vital Statistics for City of Cleveland, on December 24, 1951, under Registrar's Certificate No. 21,767.

Now what evidence is there that this birth record is that of the respondent? The respondent testified at one time that he first learned of it in about 1948, or before he came to the United States, when it was mailed to him by an uncle in Kansas City, his mother's brother, Joseph Porrello, now deceased. His adopted father, Pietro Pianetti, testified that he told the respondent when he was about 13 or 14 years of age that he was Joseph Agosto, born in the United States. That would have been, even according to his reckoning, about 1937 or 1938. The evidence then that the respondent is the person he claims to be is his own self-serving declaration. This, of course, has little evidentiary value because the credibility of the respondent is hopelessly impaired.

The respondent, since he was sixteen years of age, has a record of deceit, double-dealing and subterfuge. The results of my observation of him during the hearing did not improve the trustworthiness of his testimony. His testimony was evasive and designed to obscure the truth. The Trial Attorney on many occasions was unable to get a forthright answer from him relating to his school record or attendance in Italy. He admitted that he was married to his wife, Anna Vinci Vicis Pasqua, at the time he was a sophomore student in high school on November 19, 1944, when he was seventeen years of age. He executed an affidavit that he had read and knew the contents of

the document and swore to this before a notary public on the 3rd of June, 1968. This was signed in an action in the *Matter of Mary Marie Agosto v. Joseph Agosto,* Answer to the Cross-Complaint in Case No. 180878 in the Superior Court of the State of Washington in and for Pierce County at Tacoma (Ex. 44). In this case his present wife, Mary Marie Agosto, sought a judgment in a friendly suit declaring her to be the lawful wife of the respondent, who had abandoned his wife in Italy and had an intervening marriage in Alaska, which was later terminated by divorce. In order to create the appearance of a regular marriage in the State of Washington, the respondent was willing to lie to the Superior Court and try to obtain a judgment on the basis of his youth and a finding that the marriage was void. This is not only an admission against interest but is a further demonstration of the respondent's disregard for truth and veracity. He was willing to use the identity of Pianetti to validate his present marriage but for immigration purposes he claimed to be Agosto, a person six years older. This happened during the pendency of this proceeding.

There is ample evidence in the record that the respondent is not the Joseph Agosto he claimed to be. There is, however, evidence to the contrary based upon certified photographic records of the U. S. Department of State, some of which were unknown to the respondent and his witnesses. Exhibit 16 is an application upon which a passport was issued on December 5, 1928, by the Department of State to the

genuine Joseph Agosto, who was living in Cleveland, Ohio, with his mother, Carmela Todaro, and his father, Arcangelo Agosto (See Ex. 16). Joseph Agosto's father executed an affidavit regarding the birth of his son and an affidavit granting his full consent for his son to travel to Italy with his mother. The passport contained a picture of Joseph Agosto.

Exhibit No. 15 contains an application by the genuine Joseph Agosto for registration as an American citizen, executed May 22, 1944, at Palermo, Italy. This was four months before the respondent married his wife, Anna Vices Vinci Pasqua, according to the evidence.

Exhibit 17 is a Certificate of the Loss of Nationality by the real Joseph Agosto, executed September 27, 1948, at Palermo, Italy, together with an application, upon which a passport was issued March 27, 1947, to the real Joseph Agosto on the ground that he had not lost his United States citizenship and had taken an oath of allegiance. This contains a signature and a picture of the real Joseph Agosto. Now compare the picture with the passport application of Vincenzo Pianetti, posing as Joseph Agosto, in an application for a passport issued July 25, 1956. It will be observed that their signature and pictures are nothing alike (See also the signature on pages 2, 3, and 5 of Exhibit 18 and compare the photograph and signature of Pianetti, posing as Joseph Agosto, on pages 7 and 8 of Exhibit 18).

The sister of the genuine Joseph Agosto executed statement before the Commissioner of Police in Licata

(Ex. 13) in which she stated that she was the sister of Joseph Agosto of the late Arcangelo Agosto and Carmela Todaro, born in Cleveland, Ohio, on August 30, 1921. She stated that he died in Licata on December 14, 1951. She stated that he had embarked on an engineering career at the University of Palermo but did not graduate because of his health. She stated that she does not know Vincenzo Pianetti but that she had learned that he was using the identity of her departed brother. The respondent was offered an opportunity to cross-examine this sister of Joseph Agosto through deposition but never availed himself of the opportunity.

There is attached an authenticated copy, together with an English translation of the municipal records of Licata, Bureau of Civil Registry, recording Giuseppe Agosto as having died December 14, 1951, describing that he was born in Cleveland, Ohio, of the late Arcangelo and Carmela Todaro Agosto. It was just prior to this time that the respondent, Vincenzo Pianetti, embarked for Canada with an Italian passport under his own name. Shortly thereafter, on December 24, 1951, the Bureau of Vital Statistics for the City of Clevelend issued a birth certificate of Joseph Agosto, under Registrar's No. 21767, a photostatic copy of which was presented by the respondent, Pianetti, as his birth certificate. Respondent did not answer with candor the questions relating to his entry into the United States, although he did admit he had never been examined or admitted as an alien and he did testify that he entered the United States from Mexico.

Exhibit No. 27 is statement made by Gaspare Porrello, the brother of Crocifissa Porrello Pianetti, the adoptive mother of the respondent, Vincenzo Pianetti. In this statement it is recited that he knows Vincenzo Pianetti and identifies him as a person born on the 17th of July, 1927, in Agrigento, but he also knows him as the Joseph Vincent Agosto, the son of Arcangelo and Carmela Todaro, born in Cleveland, Ohio, on August 30, 1921. He then describes this same Joseph Agosto as the son of Angelica Porrello, who died in America, all of which is very confusing, granted it is hearsay. He said he learned that Pianetti was called Joseph Agosto in 1951 when Pianetti emigrated from Italy to America and that, after a few years in America, Vincenzo Pianetti, wrote to him under the name of Agosto and told him he had changed his name and gave him the information relating to Agosto as indicated in the beginning of the exhibit. In fact, all that he had learned about Vincenzo Pianetti's being Joseph Agosto came from the respondent, himself, after he had assumed the identity of Agosto.

The Government, after an exhaustive investigation in Italy, obtained not only overwhelming documentary evidence from Italian records that he was Pianetti, a native of Italy, but also overwhelming documentary evidence from the American Consul in Palermo, the State Department, and the Italian records and relatives of the true Joseph Agosto that he could not possibly be the Joseph Agosto, a native of Cleveland, Ohio, born August 30, 1921, who died in Italy a month after the respondent, Pianetti, departed from Italy with the Italian passport.

Before the Board of Immigration Appeals, counsel for the respondent requested a reopening of the hearing to produce the adopted parents of the respondent from Italy. They were presented and testified during the hearing. Their testimony was that Vincenzo Pianetti was the illegitimate child of Angela or Angelica Porrello, the sister of Crocifissa Porrello Pianetti; that he was born in the United States; and that his mother, Angelica Porrello, sent him to live with them in Italy when he was about two or three years of age. Their testimony did not vary much in detail. In fact, their recollection of the child's coming to Italy was lacking in detail. They had no explanation for the fact that all of the public records in Italy were contrary to their testimony except for the vague insinuation by his adoptive mother that her father may have had the records created, trying to save the family from shame because he was an illegitimate child. The record of the birth of Joseph Agosto, who the respondent claims to be, does not reveal this Joseph Agosto is illegitimate. Furthermore, the opposite would be true because the records alleged to have been created show him to be an illegitimate foundling by a mother who refused to acknowledge or accept him. The more logical action for his grandfather would have been to have spread on the records the date and place of his U. S. birth or for him to register with the American Consul, which would have made him legitimate, insofar as Italian records were concerned. The birth record of the person he claims to be, Joseph Agosto, was not recorded until 1930, some eight years after the birth (See Exhibit 24).

The testimony of the respondent's witnesses shows that he learned that he was Joseph Agosto at various times. This would have been a long time before he was married and it would have been unnecessary to declare to the Italian officials that he wes Vincenzo Pianetti. Respondent, Pianetti, testified that his uncle, Joseph Porrello from Kansas City, sent him the birth certificate after 1948 and before he came to this country (November 1951). This would not be possible because the records show that the birth certificate was not issued until the 31st of December, 1951 (See Ex. 24), and Vincent Pianetti had already arrived in Canada on his way to the United States, November 23, 1951, claiming to be 24 years of age (which would place his birth about 1927).

If he had the birth certificate as Joseph Agosto prior to leaving Italy, he could have obtained a passport as an American citizen and entered the United States rather than entering Canada with an Italian passport and then going to Mexico and coming to the United States without inspection as an alien.

The birth certificate of Joseph Agosto (Ex. 24), born in Cleveland, Ohio, in 1921, which respondent used as the basis for obtaining a passport as a United States citizen, shows a person by the name of Salvatore Agosto as the father and Carmela Todaro as his mother. Carmela Todaro Agosto issued an affidavit correcting the certificate to show the father's name to be Arcangelo Agosto. The respondent's adoptive parents both testified that the mother's name was Angelica Porrello. The birth certificate upon

which the respondent claims to be Joseph Agosto actually was never identified as pertaining to him except by the most remote hearsay.

The best evidence is the recorded declarations made before the controversy in this case arose. These declarations were properly recorded and preserved as public records. The oral testimony of witnesses to the contrary is tainted by their interest in the outcome of the issues. It is also pertinent to observe that his adoptive parents, although residing in Italy, could have come forward with the information they had about Joseph Agosto in 1967 when the Immigration Service was investigating rather than waiting until 1972. There is absolutely no reliable evidence that the two and a half year old boy they met at the boat in 1925, brought to Italy by persons whom they did not know and now do not remember, was the Joseph Agosto, born in Cleveland, Ohio, in 1921. If this were so, he would have been four years old.

At the reopened hearing the respondent presented the testimony of a witness from Akron, Ohio, by the name of Ripolino (Transcript, p. 387). Examination of Ripolino's testimony discloses that all he knows about the identity of Joseph Agosto is what the respondent, Pianetti, told him. He admitted this on cross-examination. It is also interesting to note that the Ripolino who testified is the youngest member of the family. There is no evidence from his older brother nor is there any explanation as to whether there are other living collateral relatives who might be in possession of the facts.

Always adept at obfuscation the respondent then changed his tactics to try to confuse the record to show that he was a Joseph Agosto, born in the United States as an illegitimate child of his adopted mother's sister, born in about 1923 or 1924, although it was difficult to determine just when he was born under this obscure claim. However, I believe we could rely on the statement made by his attorney on the record (Transcript, page 503, line 15):

> "* * * realizing that the only way anyone knows when they were born is what they have been told, it is our position that he was not born in 1927; that he was born at some time earlier than that. From what has been told to him and witnesses that have testified in this case, it would appear from the statements now, the testimony of Mr. and Mrs. Pianetti and from Mr. Ripolino, that the date would be in 1924—closer to 1924 than 1921."

So it can be stated without fear of contradiction by the respondent that he was not the Joseph Agosto born in Cleveland, Ohio.

I do not know of what evidentiary value the birth certificates placed in the record, Exhibits No. 60 and 61, were as none of them refer to anyone by the name of Joseph Agosto. None of them show that Angelica Porrello was his mother, and none of the witnesses could testify relating to them except Mr. Ripolino, who stated that the only thing he knew about any relationship to Pianetti was what the respondent told him.

I have concluded that all the adoptive parents testified to about the respondent is what they were told to say, just as his adopted mother's brother was coached by the respondent as he admitted in Exhibit No. 27, a statement of Gaspare Porrello to the police authorities in Italy.

On the basis of all the foregoing evidence, weighed and examined, I find the respondent is Vincenzo Pianetti, also known as Di Paola, a native of Italy and an alien. The United States immigration laws apply to the respondent, Pianetti, and the jurisdictional question is resolved.

Deportability on Charge in Order to Show Cause, "Entry Without Inspection"

Having resolved the jurisdictional question, we now come to the question of deportability on the issue raised in the Order to Show Cause: Did the respondent enter the United States without inspection as an alien and is he, therefore, deportable under the provisions of Section 241(a)(2) of the Immigration and Nationality Act [8 U.S.C. 1251(a)(2)]? This statute reads as follows:

> "Section 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— * * * (2) entered the United States without inspection * * *"

The respondent has denied all the allegations in Order to Show Cause with the exception of Allegations No. 6, 7, and 8. He, therefore, admits in those

allegations that in about December 11, 1966, he did not present himself for inspection as an alien when he entered the United States. This is corroborated by Exhibit 48 when Pianetti used a United States passport, posing as Joseph Agosto, who was born in 1921, at Cleveland, Ohio. An Immigration stamp in this passport shows that he was admitted as a United States citizen at New York, New York, October 15, 1966. Under this procedure, of course, he was not inspected as an alien. Furthermore, on the record he admitted that he had never been inspected or admitted to the United States as an alien.[8]

It is significant to note that, when the respondent had his first hearing in 1967, although under oath, he was evasive about his entry into the United States although he admitted that he entered without inspection.[9]

During his second hearing[10] he testified he made his first entry into the United States around 1950 from Mexico. He came to Canada from Italy via Air France, landing in Montreal. At that time he had a passport under the name of Vincent Pianetti. This is corroborated by the document from the Canadian Immigration giving the data relating to his arriving in Canada at that time as a visitor.[11] The respondent claimed that the Italian Consul had a copy of this passport and that he would make it available to the

[8]Transcript, page 8, lines 11-14.
[9]Transcript, page 27.
[10]Transcript, page 83.
[11]Exhibit 42.

Government within a week but the passport was never made available. He testified that he stayed in Canada two or three months because he was planning to live in Canada at first. His attorney asked him whether he was contending at the time he lived in Canada that he was a United States citizen and he answered, "No, I didn't contend that because I did not have yet the final proof or circumstances, information of my birth, which I was able to achieve upon conducting my investigation on arriving in the United States at a later date." This, of course, doesn't follow from his other testimony because he had received the birth certificate from his uncle (Ex. 24) showing Joseph Agosto to be a United States citizen and this is the document with which he entered the United States as a United States citizen when he crossed the border from Mexico. (See colloquy between attorney and the respondent, pages 84 and 85.) His testimony is inconsistent also in the respect that he was coming to Canada to stay and then, because he didn't like Canada, he was going to Mexico because he had already stated that his intended purpose was to come to the United States to inquire about his origin. The truth is that he was and is a fugitive from justice and had a prison sentence to serve in Italy. He has also admitted in the record that he did not go to the U.S. Consulate in Palermo and obtain a United States passport because he knew that the real Joseph Agosto was recorded at that Consulate at one time as having lost his United States nationality. He evidently did not know that the true Joseph Agosto had

been subsequently granted a passport as a United States citizen. The records of the genuine Agosto in the United States Consulate at Palermo would have uncovered the fact that the respondent was an imposter.[12]

The respondent is deportable under the provisions of Section 241(a)(2) [8 U.S.C. 1251(a)(2)] as an alien who entered the United States without inspection as an alien by United States Immigration Officers.

Deportability on Charge Lodged at the Hearing

During the reopened hearing the Government lodged an additional deportation charge. This charge was lodged under Section 241(a)(1) of the Immigration and Nationality Act [8 U.S.C. 1251(a)(1)], which provides as follows:

> "Section 241. (a) Any alien in the United States, including an alien crewman, shall, upon order of the Attorney General, be deported who— (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry * * *"

The class of excludable alien specified was Section 212(a)(9) of the Immigration and Nationality Act (8 U.S.C. 1182), which reads as follows:

> "Section 212(a). Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission to the United States;

[12]Transcript, page 45, lines 11-26.

> * * * (9) aliens who have been convicted of a crime involving moral turpitude * * *"

In support of this charge the Government named two crimes in Italy and one in Alaska. It was alleged that he was convicted in Italy, November 8, 1947, of crimes of forgery and fraud and that the conviction was affirmed by the court of appeals (Ex. 35); that he was convicted in Italy, August 23, 1949, for the crimes of fraud, and that on October 17, 1966, he was convicted of knowingly and willfully causing to be made, passed and uttered a false statement in violation of Title 18, U.S.C., Section 1010.

The applicable definition of moral turpitude, as enunciated in numerous administrative and judicial decisions, includes anything done contrary to justice or an act of baseness in the private and social duties which a man owes to his fellow man or to society in general.[13] The Immigration Judge need only consider the record of conviction and apply the prevalent standards of what constitutes moral turpitude to reach his conclusion.[14] The Supreme Court in *Jordan v. De George* said: "In deciding the case before the court we look to the manner in which the term 'moral turpitude' has been applied by judicial decision. Without exception, Federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude."

[13]37 Op. Atty. Gen. 293, 294.

[14]*De Lucia v. Flagg*, 297 F.2d 58, 1961; cert. den. 369 U.S. 837.

The last criminal offense charged in the Order to Show Cause, stated as an allegation of fact in Allegation No. 11, will be considered first (Ex. 35). A certified copy of the record of conviction was admitted in evidence as Exhibit 41, including the indictment, judgment, sentence, revocation of probation and commitment. The respondent was convicted under Count II of the indictment which stated in substance, that about May 28, 1962, the defendant, Joseph V. Agosto, for the purpose of obtaining for others a loan from a bank in Anchorage, Alaska, to be insured by the Federal Housing Administration, did willfully cause to be made, passed, uttered and published a false statement in an earnest money agreement that the purchasers of the property had an equity of $2,500 in the property; that the defendant, Joseph V. Agosto, knew that they did not have any equity in the property or any other amount of money sufficient to qualify for a Federal Housing Administration insured loan.

The statutory language does not include intent to defraud as an element of the offense. The mere making of the false statement, knowing it to be false, in support of an application for Federal Housing Administration mortgage insurance, constitutes the offense. A false statement, not made under oath, which does not require a fraudulent or evil intent to sustain a conviction, does not involve moral turpitude.[15] It is concluded that the conviction is not one involving moral turpitude.

[15] *Hirsch v. Immigration and Naturalization Service*, 208 F.2d 563, C.A. 9, 1962; *Matter of Espinosa*, 10 I & N Dec. 98.

We will now pass to the other criminal offenses alleged in the Order to Show Cause. The Government alleged in support of the additional charge of deportability (Ex. 35, Allegation #9) that the respondent was convicted in the criminal court of Tripani, Italy, August 23, 1949, for the crime of fraud, which sentence was affirmed by the court of appeals of Palermo, Italy, November 24, 1951. There was introduced into evidence in support of this conviction the abstract of a decision on appeal (Ex. 37, copy of Italian court record certified or authenticated by the Vice Consul of the United States, and an English translation of the Italian language document). This document recites that Vincenzo Pianetti, born in Agrigento, July 17, 1926, was an appellant against the decision of the criminal court at Tripano on August 23, 1949, for the crime of fraud. The decision of the lower court was sustained on appeal. He was at that time sentenced to imprisonment for ten months for the crime of fraud and the sentence was suspended for five years. In addition to the copy of the abstract of the appellate court's decision, a copy of the complete decision of the court was presented by the respondent and admitted in evidence together with an English translation as Exhibit #51. The decision describes the crime committed by Pianetti as aggravated swindling. The court sets forth the fact of swindling in that Pianetti obtained suits at a reduced cost by the use of forged documents where the employees of the swindled company relied on the deceit to the detriment of the company. The court further stated that the swindle was perpetrated by

fraudulent methods. Because the element of fraud is an essential element and inherent in the 1949 conviction, the offense involves moral turpitude. Swindling in Italy has been held to involve moral turpitude.[16] Whether a crime committed in a foreign jurisdiction involves moral turpitude must be determined by the standards prevailing in the United States.[17]

The remaining crime to be considered is described in Allegation No. 10 (Ex. 35). It states: "You were convicted in the criminal court of Palermo (Italy) on November 8, 1947, for the crime of forgery and fraud which sentence was modified and affirmed by the court of appeals of Palermo, Italy, July 17, 1948." Exhibit 39 is a copy of the Italian court record duly certified and authenticated by the Vice Consul of the United States at Palermo, Italy, together with an English translation. The abstract of decision No. 495 of the court of appeals at Palermo, Italy, shows that that court reviewed the judgment of the criminal court of Palermo, Italy, dated November 8, 1947. The judgment of the Palermo court sentenced the respondent, Pianetti, to eleven years and two months' imprisonment and a fine of 7,000 lira for forgery of public documents and aggravated fraud. On appeal the court of appeals found that all the forgeries considered by the lower court constitute one single crime of repeated forgery committed by Pianetti and his accomplice, and assessed the penalty as imprisonment

[16] *Matter of M-*, 9 I & N Dec. 132, 1960.

[17] *Mercer v. Lance*, 96 F.2d 122, C.A. 10, cert. den. 305 U.S. 611; *McKenzie v. Savoretti*, 200 F.2d 546, C.A. 5; *Matter of M-*, 9 I & N Dec. 132.

for two years and eight months. It confirmed the penalty fixed by the lower court at imprisonment for one year and one month and a fine of 4,000 lira for repeated fraud, and assessed the penalty of imprisonment for two months for usurpation of public functions. Other violations, misdemeanors, considered by the lower court, the appeals court recited, were covered by an amnesty. This is not material to a decision in this case.

The complete decision on appeal was admitted into evidence as Exhibit No. 52. An English translation was prepared by the Division of Languages of the United States Department of State which gives a more detailed account of the offenses. It refers to continued and recurrent acts of forgery and fraud relating to public documents by the respondent. Forgery of public documents in Italy has been held to be a crime involving moral turpitude under Section 476 of the Italian Criminal Code of 1930.[18] The same section was considered by the court of appeals in the respondent's case (Ex. 52, English translation). The crime, therefore, is one involving moral turpitude.

The respondent's defense to the criminal charges lodged during the reopened hearing ineffectively challenged the Italian court records and the English translation. He offered no affirmative evidence of probative significance.

He argued that, if he was Vincenzo Pianetti as the Government claims, he would have been a minor

[18] *Matter of M-*, 9 I & N Dec. 132, 139.

at the time he was involved in the criminal activities in Italy. The mere fact that the respondent was a minor at the time the crimes established herein were committed does not insulate him from deportation because of the conviction.[19] There is nothing in the record to establish that the respondent was even considered a juvenile. Where local law treats him as an adult despite his age and he was prosecuted for a crime, he is amenable to deportation.[20] No evidence was presented by the respondent other than the bare statement that he was a juvenile at the time of his convictions in Italy. The appellate review of the records does not mention it, nor does his criminal record (Ex. 11). The facts are as follows: The respondent was almost twenty when he was convicted November 8, 1947 (Ex. 11). He was nineteen when the crimes were committed from October to December, 1946 (Ex. 52, translation p. 2).

There was admitted in evidence as Exhibit 50 a statement from an Italian attorney that no moral turpitude inheres according to Italian law in the crimes attributed to Pianetti. This is a mere conclusion and is immaterial, since, as it has been previously stated, the law of the United States controls the question of whether or not the crimes involve moral turpitude.

Based upon all the evidence presented during the first and the reopened hearing I find it has been

[19] *Circelli v. Sahli*, 216 F.2d 33, C.A. 7, 1954, cert. den. 348 U.S. 964; *Adams v. U.S.*, 299 F.2d 327, C.A. 9, 1962; *Hernandez v. Rosenberg*, 304 F.2d 639, C.A. 9, 1962.

[20] *Matter of C—M—*, 9 I & N Dec. 487, 1961.

established by clear, convincing and unequivocal evidence that the respondent is deportable under the provisions of Section 241(a)(1) of the Immigration and Nationality Act as an alien who was excludable at entry under the provisions of Section 212(a)(9) because of conviction of crimes involving moral turpitude, to wit, forgery and fraud, on the charge lodged during the hearing. He is not deportable under that charge for the crime of uttering a false statement in the Federal Housing Administration transaction.

Application For Ancillary Relief From Deportation:

The respondent has applied for relief under the provisions of 241(f) of the Immigration and Nationality Act, which reads as follows:

> "The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or an alien lawfully admitted for permanent residence."

The respondent evidently ignored the statutory injunction saying that the insulation from deportation provided for under this provision of law applies only to aliens who are otherwise admissible at the time of entry. As pointed out heretofore, the respondent was found inadmissible to the United States under

the provisions of Section 212(a)(9) of the Immigration and Nationality Act because he had been convicted of a crime involving moral turpitude prior to entry, including any entry he has made into the United States. Contrary to the respondent's claim, the courts have construed the foregoing provision of law as relating to qualitative causes of excludability.[21]

The respondent cannot meet the requirements of the statute as interpreted in the *Matter of Lee*, supra. The Ninth Circuit Court of Appeals in a recent decision has followed the decision of the Attorney General in the *Matter of Lee*, supra, and held that Section 241(f) does not free from deportation those who entered the United States without inspection.[22] The respondent has admittedly done this on various occasions by circumventing the visa issuing process upon a knowingly false claim to United States citizenship. There are no Circuit Court decisions to the contrary, but two Circuits support the position.[23]

I find, therefore, that for both of the reasons stated above, the respondent is not in the non-deportable class mentioned in Section 241(f) of the Immigration and Nationality Act.

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[21] *Immigration and Naturalization Service v. Errico*, 385 U.S. 214, 17 L.Ed.2d 318, 87 S.Ct. 473 (1966); *Scott v. INS*, same citation; *Matter of Lee*, Interim Decision, 1960 (A.G. 1969); *Lee Fook Chuey v. INS*, 439 F.2d 244 (9th Circuit, 1971); *U. S. v. Osuna-Pecos*, 443 F.2d 907 (9th Circuit).

[22] *Monarrez-Monarrez v. INS*, — F.2d — (9th Circuit 72-1397, December 21, 1972).

[23] *Franti v. INS*, 399 F.2d 98 (6th Circuit, 1968); *Tsaconas v. INS*, 397 F.2d 946 (6th Circuit, 1968).

The respondent has applied for withholding of deportation under the provisions of Section 243(f) of the Immigration and Nationality Act. During his first hearing in 1968 he designated Italy as the country to which he wished to go in the event he was deported from the United States. During his last hearing he applied for the withholding of deportation on the grounds that if returned to Italy he would be subject to persecution because they would prosecute him for bigamy. Prosecution for crimes or restriction because of prior criminal activity is not persecution contemplated by the statute.[24]

Eligibility for adjustment of status to that of a permanent resident under the provisions of Section 245 of the Immigration and Nationality Act of 1952.[25] This Act provides:

> "(a) The status of an alien, other than an alien crewman, *who was inspected and admitted* (emphasis supplied) or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved."

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[24] *Sheng v. INS*, 400 F.2d 678 (9th Circuit, 1968), cert. den. 393 U.S. 1054 (1969); *Matter of Sun*, 11 I & N 872 (1966); *Matter of Nagy*, 11 I & N 888 (1966); *Kalatjis v. Rosenberg*, 305 F.2d 249 (9th Circuit, 1962).

[25] 8 U.S.C. 1255.

Relief under this section of law is not available to those aliens who enter the United States by willfully making a false claim to American citizenship and eluding inspection as the respondent did in this case.[26]

As we have previously pointed out, the respondent is inadmissible to the United States under the provisions of Section 212(a)(9) of the Immigration and Nationality Act for the conviction prior to entry of a crime involving moral turpitude. He would, therefore, be unable to qualify for adjustment under the provisions of Section 245 of the Immigration and Nationality Act because he is ineligible for a visa under Section 212 of the Act. He cannot be relieved of inadmissibility arising out of the criminal charge under Section 212(a)(9) of the Act because it is only available to one who is eligible for adjustment under the statute [8 C.F.R. 245.1(f)], which reads:

> "Except as provided in Parts 235 (relating to applications for admission to the United States at a port of entry) and 249 of this chapter (which relates to the creation of a record of entry for aliens who entered the United States prior to June 30, 1948), an application under this part shall be the sole method of requesting the exercise of discretion under sections 212 * * *, (h), * * * of the Act, insofar as they relate to excludability of an alien in the United States."

The respondent is ineligible because he entered without inspection. It is concluded, therefore, that

[26] *Matter of K— B— N—*, 9 I & N 50 (1960); *Matter of S—*, 9 I & N 599 (1962); *Matter of Woo*, 11 I & N 706 (1966); *Matter of Wong*, 12 I & N 733 (1968); *Hung v. INS*, 380 F.2d 336, 337 (1st Circuit, 1967), cert. den. 387 U.S. 975.

the respondent is not eligible for adjustment of his status to that of a permanent resident under the provisions of Section 245 of the Immigration and Nationality Act and his application is denied.

Another application for relief in the respondent's case is under the provisions of Section 244(a) of the Immigration and Nationality Act [8 U.S.C. 1254(a)], which reads as follows:

> "(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and— (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."

In examining his eligibility for relief under this provision of the statute, it is clear that he has resided in the United States continuously for seven years immediately preceding the date of his application for relief and, since he is the father of a United States

citizen child and has a United States citizen spouse and is supporting them, it is concluded that his deportation would result in extreme hardship to them.

The respondent, however, has not established that he has been a person of good moral character for a period of seven years immediately preceding the date of his application for suspension of deportation, or subsequent to May 5, 1962. A finding of good moral character is precluded in certain situations provided by statute [Section 101(f), Immigration and Nationality Act of 1952, 8 U.S.C. 1101(f)]. Paragraph (6) of that section prevents a person from establishing good moral character for the purpose of suspension of deportation, who has given false testimony for the purpose of obtaining any benefits under this Act (Immigration and Nationality Act of 1952). These false statements were made before me during each session of the deportation hearing. The respondent knowingly left Italy as Vincenzo Pianetti and entered the United States as an imposter under the identity of Joseph Agosto. He continued to assert that false claim during this deportation proceeding under oath in his testimony. This is not a case where an alien could make an honest mistake as a result of information given to him by interested relatives. He knew of his origin and identity at the time of his marriage and at the time of his convictions and at the time he applied for a passport to come to Canada. It is clear from this record that when he could not sustain his claim to be the Joseph Agosto born in Cleveland, Ohio, in 1921, he then chose to muddy

the waters by making a claim that he was the illegitimate son of his mother's sister, a claim that he could not substantiate by credible probative evidence. The only purpose for his false claim to United States citizenship was to avoid deportation, which is certainly a benefit as contemplated by Section 101(f)(6).

But this is not the only reason that the respondent has failed to establish his burden of showing good moral character for a period of the last seven years. He has been in trouble because of fraud and deceit since he was about nineteen years old. Besides the convictions in Italy, which have been enumerated, the record shows that he was convicted in Alaska of a crime, which, even if it can't be regarded as one involving moral turpitude for the purposes of Section 212(a)(9) of the Act, certainly involves deceit and sharp practices. The witnesses he presented with respect to his good moral character and reputation did not cover the statutory period nor did their knowledge of his activities qualify them to conclude that he was a person of good moral character for the statutory period.

Respondent was asked to bring in evidence of his interest in certain corporations and to specify the amount of his interest as a stockholder, together with a list of all of the law suits that he was involved in, in his own name and as a person with an interest in a corporate entity, either as an officer or stockholder (Transcript page 546). He agreed to this. Nothing of this sort has been received by the Immigration Judge.

There has been submitted a report of an investigation conducted by the Immigration and Naturalization Service. I find nothing in it that would be other than cumulative and, therefore, do not draw any adverse inferences in the writing of the decision in this case on the basis of the material submitted or referred to in the investigation. For this reason, it is unnecessary to reopen the hearing to admit it into evidence or to afford the respondent an opportunity to refute the claims made in the investigation.

The application for suspension of deportation is denied.

For the foregoing reasons, his application for voluntary departure is denied because of failure to establish good moral character and as a matter of administrative discretion.

ORDER: It is ordered that the respondent's application for a waiver of excludability under the provisions of Section 212(h) of the Immigration and Nationality Act and for permanent residence under the provisions of Section 245 of the Immigration and Nationality Act be denied.

It Is Further Ordered that the respondent's application for suspension of deportation under the provisions of Section 244(a) of the Immigration and Nationality Act and for voluntary departure under the provisions of Section 244(e) of the Immigration and Nationality Act be denied.

It Is Further Ordered that the respondent's application for withholding of deportation under the

provisions of Section 243(h) of the Immigration and Nationality Act be denied.

It Is Further Ordered that the respondent be deported from the United States to Italy on the charge contained in the Order to Show Cause and on the charge lodged during the hearing.

It Is Further Ordered that the record be certified to the Board of Immigration Appeals for final decision.

/s/ John W. Keane
John W. Keane
U. S. Immigration Judge

No. 76-1410

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH V. AGOSTO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 549 F. 2d 806.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1977. A petition for rehearing was denied on March 23, 1977. The petition for a writ of certiorari was filed on April 12, 1977 (Pet. App. iii). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a genuine issue of material fact exists as to petitioner's nationality that would entitle him to a *de novo* hearing in the district court on this issue prior to deportation.

STATEMENT

1. In 1967, deportation proceedings were instituted charging petitioner with entering the United States without presenting himself for inspection as an alien, in violation of Section 241(a)(2) of the Immigration and Nationality Act, 66 Stat. 204, as amended, 8 U.S.C. 1251(a)(2). At the deportation hearing, petitioner claimed that he was a United States citizen (Pet. 3-4). Petitioner did not present any documentary evidence in support of his claim (Pet. App. vii). Instead, he relied upon the testimony of three witnesses, Mr. and Mrs. Pianetti, who had taken him from a foundling home and raised him, and Carmen Ripolino, who claimed to be his half brother (Pet. 4). These witnesses testified in support of petitioner's contention that he was Joseph Agosto, who was born in Cleveland, Ohio, in 1921.

On the other hand, the government's evidence established that petitioner was a native and citizen of Italy, who was born in Agrigento, Italy, on or about July 16, 1927. The government produced a copy of an entry in the Registry of Births indicating that respondent was born on July 17, 1927, to a woman who did not wish to be named, and was sent to a foundling home in the custody of a person who declared his birth before the registrar (Pet. App. vi). Documents also show that he was placed in an orphanage and baptized at the age of approximately two days (*ibid.*), and that a month later he was entrusted to the care of a couple, Pietro and Crocifissa Pianetti, and was later "affiliated" by them—that is, a court order was obtained allowing him to assume their surname (*ibid.*).

In 1947, petitioner was convicted in Italy of impersonating a police officer and judge in connection with a scheme concerning forged ration coupons, and was sentenced to imprisonment (S.R. 121-122). Petitioner thereafter obtained an Italian passport on which he falsely represented himself to be an "industrial attorney" and left for Canada under the name of Vincent Pianetti, leaving a wife and children in Italy (S.R. 106-107, 191).

Around 1950, petitioner entered the United States from Mexico after showing a birth certificate identifying him as "Joseph V. Agosto," born in Cleveland, Ohio, in 1921. (S.R. 62, 69, 108, 113, 611).[1] He subsequently obtained other forms of identification, including several United States passports (S.R. 69, 113). Since his arrival, petitioner has used the name "Joseph V. Agosto" in all of his affairs in this country, including two marriages and a divorce. He was also convicted under that name of assisting in the falsification of papers in support of loan applications to the Federal Housing Administration, in violation of 18 U.S.C. 1010 (S.R. 614-615).

Petitioner conceded that the Italian records relate to him, but asserted that they were created in an effort to conceal the fact that his mother had given birth to him out of wedlock (Pet. App. vi).

2. On the basis of these facts, the Immigration Judge found petitioner deportable (S.R. 593-627). After carefully reviewing the evidence, the judge concluded that it overwhelmingly refuted the possibility that petitioner was Joseph Agosto, born in Cleveland, Ohio (S.R. 606-609).[2] The Board of Immigration Appeals affirmed the

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[1]Petitioner claimed that his uncle had sent him the birth certificate in 1948, but official records show that certificate was not issued until December 31, 1951 (S.R. 607). This was several weeks after a Joseph Agosto, who met the description on the birth certificate, died in petitioner's home town of Licata, Italy (S.R. 604).

[2]The Immigration Judge found petitioner deportable on the additional ground that he was an alien who had been convicted of a crime involving moral turpitude (S.R. 613) and denied petitioner various forms of discretionary relief from deportation (S.R. 619-624). Petitioner does not challenge those rulings here.

order of deportation, finding that the government had proved petitioner's alienage by "clear, convincing, and unequivocal" evidence (Pet. App. xi).

The court of appeals, with one judge dissenting, affirmed the decision of the Board of Immigration Appeals and denied petitioner's request, under 8 U.S.C. 1105a(a)(5), to transfer the proceeding to district court for a *de novo* hearing on his claim of citizenship. It held that the evidence did not "disclose a colorable claim to United States nationality • • •" (Pet. App. ii).

ARGUMENT

Pursuant to 8 U.S.C. 1105a(a)(5), if a person seeking review of an order of deportation, who claims to be a national of the United States, "makes a showing that his claim is not frivolous," the court of appeals must, "where a genuine issue of material fact as to the petitioner's nationality is presented," transfer the proceedings to a United States District Court for a hearing *de novo* of the nationality claim. See also *Kessler* v. *Strecker*, 307 U.S. 22, 35; *Ng Fung Ho* v. *White*, 259 U.S. 276.

Petitioner contends that under this provision the court of appeals should have transferred his case to the district court. He argues that he has presented evidence that, if believed, is sufficient to establish his American citizenship, and that the court of appeals upheld the deportation order only by improperly weighing and discounting the credibility of his witnesses. He also alleges that the decision below conflicts with those of other circuits, by making the Ninth Circuit "the only court which has denied transfer under the statute where the administrative decision turned on the question of the credibility of petitioner's witnesses" (Pet. 8-9).

Petitioner's fundamental error is that this case does not "turn[] on • • • the credibility of petitioner's witnesses." While there was dispute over the credibility of the Pianettis and of Carmen Ripolino, and while the Board of Immigration Appeals noted that the immigration judge had found these witnesses not to be credible (Pet. App. viii), petitioner has not established a substantial, nonfrivolous claim of American citizenship even if the testimony of his witnesses were credited. See *Rassano* v. *Immigration and Naturalization Service*, 377 F. 2d 971, 972-973 (C.A. 7). As the Board of Immigration Appeals noted, even accepting *arguendo* petitioner's evidence, in order to conclude that petitioner is a United States citizen, it would be necessary to believe (Pet. App. ix):

> 1) that the respondent's natural father was Salvatore Agosto (Tr. pp. 305, 340); (2) that Salvatore Agosto fathered a child born in 1921 in Cleveland, Ohio, whose name was Joseph, or Giuseppe, Agosto (Exs. 2 & 3), but that this child was *not* the respondent; (3) that the respondent's mother gave birth to a son in Akron, Ohio, in August of 1923 (Tr. p. 392), and that the father of this child was Giacomo Ripolino and not the father of the respondent (Tr. p. 395); (4) that the respondent's mother next gave birth to the respondent in August of 1924, one year later, in Cleveland, Ohio (Tr. p. 514); (5) that she knew the father of the respondent to be Salvatore Agosto (see Tr. 305, 340) and named the respondent Joseph or Joe Agosto, the same name that was given to an earlier child of the respondent's father (Tr. p. 482); (6) that the respondent's mother again began living in the same household as Giacomo Ripolino, and gave birth to a third son in Akron, Ohio, another year later in September of 1925 (Exs. 60 & 61; Tr. p.

399); (7) that the respondent's mother had him baptized in the United States (Tr. pp. 355-57); (8) that the respondent, who can afford to send an investigator to Italy to search records (Tr. pp. 425-26), has not been able to produce a certificate of his United States baptism, even though he ostensibly knows the name under which he would have been baptized and the general vicinity of Ohio in which the baptism likely would have occurred.

On these facts, the court of appeals properly concluded that "The evidence presented to the immigration judge does not disclose a colorable claim to United States nationality • • •" (Pet. App. ii). The veracity of petitioner's witnesses was not a material fact relating to petitioner's claim that he is a United States citizen. Since the court of appeals did not evaluate "the credibility of petitioner's witnesses", its decision does not conflict with those of other courts of appeals, which have held that an issue of the credibility of a witness that is critical to a claim of American citizenship must be determined *de novo* by by the district court. See, *e.g., Pignatello* v. *Attorney General*, 350 F. 2d 719, 723-724 (C.A. 2). The court of appeals correctly refused to transfer this case to the district court for a *de novo* hearing.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1977.

DOJ-1977-08

No. 76-1410

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

JOSEPH V. AGOSTO,
Petitioner,

VS.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 549 F. 2d 806.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1977. A petition for rehearing was denied on March 23, 1977 (Pet. App. iii). The petition for a writ of certiorari was filed on April 12, 1977, and was granted on October 17, 1977. This Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 8 U.S.C. 1105a(a)(5) requires proceedings to be transferred to the district court for a *de novo* hearing where the Board of Immigration Appeals, the agency charged with making a final administrative determination of petitioner's nationality claim, has found that his evidence is sufficient, if believed, to support his claim to United States citizenship.

STATUTE INVOLVED

Section 106(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a)(5), provides as follows:

> Whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of Title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise.

STATEMENT

Petitioner claims that he is a United States citizen under the provisions of 8 U.S.C. 1401(a)(1) by virtue of birth in the United States in 1924 (S.R. 547),[1] and that his mother sent him to Italy at the approximate age of 2½ years to live with her sister and brother-in-law (S.R. 331-332, 368-369). It is undisputed that petitioner has lived in the United States since at least the mid-1950's (S.R. 105); that he was married to a United States citizen in 1959 (S.R. 128; Ex. 43; R. 477, S.R. 186, App. 56); and that he is the father of four United States citizen children (S.R. 129, 137, 508; Ex. 43; R. 477, S.R. 186).

The government contends that petitioner is an alien, born in Agrigento, Italy, on or about July 16 or 17 in the year 1927, given the name Vincenzo Di Paola at birth, and later the surname of Pianneti by Pietro and Crocifissa Pianneti, the couple that affiliated him under Italian law in 1943. Its proof consists of documents made many years ago in Italy purporting to show petitioner's birth there. Primarily, the government relies upon two records: (1) a copy of an entry in the Registry of Births for the City of Agrigento, Italy indicating that Vincenzo Di Paola was born on July 17, 1927 to a woman who did not wish to be named and was sent to a foundling home in the custody of a person who declared his birth before the

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[1] "R" refers to the certified administrative record filed in the court below on June 13, 1975. "S.R." refers to the supplemental administrative record filed in the court below on August 22, 1975. Said records are lodged with the clerk of this Court and are partially reproduced in the Appendix.

registrar (Ex. 64; R. 666, S.R. 448), and (2) an annotation from the Registry for the Reception of Foundlings of the Provincial Institute of Assistance to Infancy of Agrigento which recites that Vincenzo Di Paola was consigned on August 26, 1927 to Crocifissa Porrello, wife of Pietro Pianneti (Ex. 65; R. 671, S.R. 474).

Petitioner conceded that he had used the names of Vincenzo Di Paola and Vincenzo Pianneti during his residence in Italy, and that the records produced by the government related to him (S.R. 95; Pet. App. vi). He denied, however, that these records accurately reflect his given name at birth and his date and place of birth (S.R. 94-97). The authenticity of the basic records was challenged by James Witt, who testified that he discovered numerous irregularities on examination of these records in Italy (S.R. 461, 465, 470-471, 499). Pietro Pianneti and his wife, Crocifissa Pianneti, testified that the records ostensibly showing that petitioner was born of unknown parents in Italy, placed in a foundling home, and later consigned to the care of Mrs. Pianneti, had all been "created" by Angelo Porrello, petitioner's maternal grandfather, in order to conceal the fact that his daughter had given birth to an illegitimate child in the United States (S.R. 334-335, 337, 339, 372, 376). Mrs. Pianneti denied that she had ever taken the petitioner from an orphanage (S.R. 512). Petitioner's true origin was never disclosed by Angelo Porrello or the Piannetis to other relatives or friends in Italy (S.R. 336, 376).

The testimony of Pietro Pianneti (S.R. 323-363; 444-456) and Crocifissa Pianneti (S.R. 363:391; 511-515) directly supported the petitioner's claim that he was born in the United States. Both testified that Mrs. Pianneti's sister, Angela or Angelica Porrello, was married in Italy to a Salvatore Santa Maria, and that she had two daughters born in Italy as issue of this marriage (S.R. 328, 385, 390, 451). She departed from Italy in the early 1920's to take up residence in the United States (S.R. 328, 365). Thereafter, she lived in Ohio until her death in about 1937 (S.R. 329, 367). Over the years she corresponded frequently with the Piannetis (S.R. 329, 366). They learned from her letters that she had given birth to three sons in the United States, Angelo Agosto Ripolino, the petitioner, and Carmello Ripolino (S.R. 326-327, 450, 452, 514). These children were all illegitimate, since Angela Porrello never terminated her marriage to Salvatore Santa Maria (S.R. 451). When petitioner was about 2½ years of age, arrangements were made through correspondence between petitioner's mother and Mrs. Pianneti for petitioner to be sent to Italy to live with the Piannetis and Angelo Porrello (S.R. 331, 368). Petitioner arrived in Palermo in 1927 by a ship that came from New York (S.R. 330-331, 368). He was met at the ship by Mr. Pianneti and Angelo Porrello and taken to their home in Licata (S.R. 330, 332).

Petitioner resided with Mr. and Mrs. Pianneti until 1944 (S.R. 384). When he was growing up petitioner often asked the Piannetis about his origin, and they

finally told him he was born in the United States and his mother was Angela Porrello (S.R. 340-341, 379-381). Petitioner then wrote to a relative in the United States in an attempt to obtain proof of his birth here, but neither Mr. Pianneti nor Mrs. Pianneti could testify as to exactly what documents he received pertaining to his birth in the United States (S.R. 341, 381). Mr. Pianneti testified that petitioner returned to the United States in 1951 and that he has since lived in this country (S.R. 342).

Carmen Ripolino testified that he was born in Akron, Ohio, and that his mother's name was Angela Porrello (S.R. 420). As a young boy he was told that his mother was originally from Licata, Sicily and that she had come to the United States in 1922 (S.R. 421, 423-424). He is uncertain as to the identity of his natural father (S.R. 420-421). One of his birth certificates shows that he was born on September 12, 1925, and that his father was Charles Litizia (Ex. 60; R. 662, S.R. 429). Another birth certificate shows his birth date as September 1, 1925 and his father as Giacomo Ripellino (Ex. 61; R. 663, S.R. 429). At certain times he was told that Charles Litizia was his father, and at others that Giacomo Ripolino was his father (S.R. 427). He grew up with an older brother by the name of Agosto Angelo Ripolino, who was born in Akron, Ohio to Angela Porello and believes his father to be Giacomo Ripolino (S.R. 422-423, 427).

When he was very young, Carmen Ripolino's mother told him that he had two half sisters, both of whom had been born in Italy as issue of her marriage

to Santa Maria (S.R. 424, 431). She also told him that he had a half brother, who had been born to her in the United States and later was sent by her to live in Italy (S.R. 424, 431). Carmen Ripolino recalled that his mother often wrote and sent packages to her sister in Italy (S.R. 430). He testified that his mother died on December 20, 1937 (S.R. 422; Ex. 62; R. 664, S.R. 445).

Petitioner last arrived in the United States on or about December 11, 1966, and was then admitted upon presentation of a United States passport (App. 4-5). On September 5, 1967, deportation proceedings were commenced against petitioner by issuance of an order to show cause, charging that he was deportable under Section 241(a)(2) of the Immigation and Nationality Act, 8 U.S.C. 1251(a)(2), as an alien who had entered the United States without inspection (App. 4-6). At a later deportation hearing, an additional charge of deportability under Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251 (a)(1), was lodged against petitioner (App. 21-22). Petitioner denied deportability under both of these charges, contending that as a native born United States citizen he was not amenable to deportation proceedings (S.R. 28-31, 168). 8 U.S.C. 1251.

The immigration judge found the testimony of the Piannetis and Carmen Ripolino not to be credible (App. 39-41). Accordingly, in his decision dated April 11, 1973, he rejected petitioner's claim to citizenship, found petitioner to be a deportable alien, and ordered

that he be deported to Italy (App. 23-59).[5] After summarizing the evidence, the Board of Immigration Appeals concluded that:

> If believed, the testimony of the Piannetis and of Carmen Ripolino clearly refutes the Service's otherwise strong documentary demonstration of the [petitioner's] alienage (Pet. App. viii).

Although the Board of Immigration Appeals acknowledged that the immigration judge misread part of the testimony of the Piannetis and that his opinion failed to fully reflect the potential import of the testimony of Carmen Ripolino, it nevertheless deferred to the immigration judge on the question of credibility, and thus affirmed his decision (Pet. App. iv-xiii).

Petitioner then filed a petition for review, requesting transfer of the proceedings to the United States District Court for a hearing *de novo* pursuant to 8 U.S.C. 1105a(a)(5). On January 24, 1977, the United States Court of Appeals for the Ninth Circuit, with Judge Hufstedler dissenting, rejected petitioner's request for transfer of the proceedings and affirmed the decision of the Board of Immigration Appeals (Pet. App. A).

SUMMARY OF ARGUMENT

I. By its use of summary judgment language in Section 106(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a)(5), which codified the

[5]The immigration judge also denied petitioner various forms of discretionary relief from deportation not at issue here (App. 51-58).

constitutional right of a citizenship claimant to a judicial trial, Congress indicated an intention to reduce the burden of proof required for transfer of proceedings by a court of appeals to a district court from "substantial evidence" to evidence having a "modicum of substantiality" showing "nothing more than the claim not be frivolous."

II. The evidence presented by petitioner in his administrative proceedings entitled him to a judicial determination of his claim of citizenship regardless of the evidentiary standard applied, since it was sufficient, if believed, to support his claim.

III. The court below improperly engaged in the function of weighing and determining the credibility of petitioner's evidence. In this regard, its decision conflicts with the decisions of other circuits which have construed the statute.

IV. The proper scope of review of the administrative record by the lower court in the instant case did not extend beyond the decision of the Board of Immigration Appeals, wherein it was found that petitioner had produced substantial evidence in support of his claim to citizenship. The net effect of the decision below is to sanction final resolution of petitioner's claim, where credibility was the determinative factor, to a hearing officer in the executive department. Hence, the decision contravenes constitutional principles and also violates the express terms of the statute.

ARGUMENT

I

BACKGROUND AND ANALYSIS OF THE STATUTE

In *Ng Fung Ho v. White*, 259 U.S. 276 (1922), this Court held that a resident of the United States who claims to be a citizen has a constitutional right to a judicial trial on the issue of nationality if the evidence produced at his administrative hearing was sufficient, if believed, to support a finding of citizenship. Speaking for the Court, Mr. Justice Brandeis stated the rationale for divesting the executive department of jurisdiction to determine a claim to citizenship, as follows (259 U.S. at pp. 284-285):

> To deport one who so claims to be a citizen obviously deprives him of liberty, as was pointed out in *Chin Yow v. United States*, 208 U.S. 8, 13, 28 Sup.Ct. 201, 52 L.Ed. 369. It may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court.

In later cases reaffirming the rule enunciated in *Ng Fung Ho*, the Court used the term "substantial evidence" with reference to the burden that a citizenship claimant must satisfy in order to be entitled to a *de novo* hearing in district court. *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 152 (1923); *Kessler v. Strecker*, 307 U.S. 22, 34, 35 (1939).

The constitutional principle that a claim to citizenship must be judicially rather than administratively determined was codified as 8 U.S.C. 1105a(a)(5) by the enactment of Section 5(a) of the Act of September 26, 1961, P.L. 87-301, 75 Stat. 651. By its terms the statute requires, as a condition to an evidentiary hearing in district court, no more than the showing of a nonfrivolous claim and the existence of a genuine issue of material fact as to nationality. Clause (A) of the statute authorizes a court of appeals to, in effect, grant summary judgment for the government only " * * * when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented."

The close similarity of the language contained in Clause (A) of the statute and language traditionally used in summary judgment statutes suggests that Congress may have intended to relax the evidentiary requirements for obtaining a judicial determination of nationality when it enacted 8 U.S.C. 1105a(a)(5). It can be argued from the terminology employed in the statute that the "sufficient evidence, if believed" or the "substantial evidence" test has been supplanted by a more liberal test requiring only the disclosure of a nonfrivolous claim to American citizenship in the administrative record and the presentation of a genuine issue of material fact in the petition for review filed with the court of appeals. Support for this view can be found in *Pignatello v. Attorney General*, 350 F.2d 719 (C.A. 2, 1965), where the court said (350 F.2d at p. 723):

It is not inconsistent with this principle to require, as the statute does, that there be a *modicum of substantiality* to the claim of citizenship. However, what the petitioner is seeking, and is entitled to, is a *de novo* judicial determination of the claim, not judicial review of the administrative disposition of that claim. Thus what section 106(a)(5) requires, as a condition of a *de novo* judicial determination of the claim of citizenship, is *nothing more than the claim not be frivolous.* * * *

The requirement of subdivision (B) of section 106(a)(5) that a genuine issue of material fact be presented goes, not to whether petitioner is entitled to a *de novo* judicial determination of the claim of citizenship, but to whether this determination is to be made only after an evidentiary hearing in a district court or whether it could be made by the circuit court of appeals on the basis of the pleadings and affidavits. Drawing on the familiar principles relating to summary judgment in the federal courts, the statute permits the circuit court of appeals to determine the claim of citizenship only "when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented". If such an issue does appear, then the proceedings should be transferred to a district court for an evidentiary hearing on this claim of citizenship * * * (emphasis supplied).

The difference between producing evidence in deportation proceedings that may be characterized as "sufficient, if believed" or "substantial" as opposed to evidence having a "modicum of substantiality" showing "nothing more than the claim not be frivolous" is

apparent. The court's interpretation of the statute in *Pignatello* comports with the plain meaning of the words used by Congress and is in accordance with the doctrine that the law should be construed "as far as is reasonably possible in favor of the citizen". *Schneiderman v. United States,* 320 U.S. 118, 122.

II

PETITIONER'S EVIDENCE SATISFIED BOTH THE CONSTITUTIONAL AND THE STATUTORY EVIDENTIARY STANDARDS

Petitioner is entitled to a transfer of the proceedings to a district court regardless of the evidentiary standard applied, since the evidence produced in his administrative proceedings was substantial and was clearly sufficient, if believed, to support his claim to citizenship. The testimony of Pietro Pianneti and his wife, Crocifissa Pianneti, concerning petitioner's origin directly contradicted the documentary evidence relied upon by the government. The Piannetis gave detailed testimony concerning the facts surrounding petitioner's birth and his early upbringing. A good part of their testimony was corroborated by Carmen Ripolino, the petitioner's half brother.

If the testimony of the Piannetis and Carmen Ripolino is accepted as credible, there is no question that petitioner was born in the United States, and that the records purporting to show his birth in Italy were created by his maternal grandfather for the purpose of concealing petitioner's illegitimacy. The petitioner's claim to citizenship was rejected in the

administrative proceedings solely on the basis of the credibility of his witnesses, and not because he failed to produce substantial evidence in support of his claim. The immigration judge concluded that the testimony of the Piannetis was tainted by their interest in the outcome of the issues; that they had failed to come forward and testify at an earlier investigative stage of the proceedings; and that they had been coached as to their testimony (App. 39, 41). Essentially identical reasons were expressed by the immigration judge for not giving credence to the testimony of Carmen Ripolino (App. 30-40).

On appeal, the Board of Immigration Appeals recognized that petitioner had presented substantial evidence supporting his citizenship claim at his deportation hearings and that his claim depended entirely upon the credibility of his witnesses. After discussing the documentary evidence introduced by the government and the testimony of petitioner's witnesses, the Board found that:

> If believed, the testimony of the Piannetis and of Carmen Ripolino clearly refutes the Service's otherwise strong documentary demonstration of the [petitioner's] alienage (Pet. App. viii).

With respect to the issue of credibility, the Board followed the familiar principle of deferring to the immigration judge, who is in the best position, as the administrative trier of fact, to judge the veracity of witnesses (Pet. App. viii). The opinion of the Board leaves no doubt that the administrative disposition of petitioner's claim to citizenship turned on the issue of credibility.

III

THE STATUTE DOES NOT AUTHORIZE THE COURT OF APPEALS TO WEIGH THE EVIDENCE AND DETERMINE ITS CREDIBILITY

The court below mistakenly perceived its function under the statute to include weighing the evidence and determining its credibility. Its reliance upon the substantial evidence standard which was set forth as dictum in *Kessler v. Strecker,* 307 U.S. 22, 35 (1939), decided prior to enactment of 8 U.S.C. 1105a(a)(5), indicates that the court improperly engaged in weighing the evidence adduced in the administrative proceedings. The correct construction given to the statute in *Pignatello v. Attorney General,* supra, limits the court of appeals role to ascertaining whether the administrative record contains a modicum of substantiality to the claim of citizenship and shows that the claim is not frivolous. If this burden has been met, the statute mandates transfer of the proceedings unless the petition fails to present a genuine issue of material fact.

As the dissenting opinion of Judge Hufstedler in the instant case pointed out, the majority of the panel undertook to determine the credibility of petitioner's evidence. This is a task assigned by the statute to the district court where live testimony can be presented and a complete record can be developed. Among those circuits that have had occasion to deal with the statute the Ninth Circuit stands alone in its assumption of the duty of fact finding. In *Rassano v. Immigration and Naturalization Service,* 377 F.2d 971 (C.A. 7, 1967), the claim to citizenship was based upon the

alleged naturalization of the petitioner's deceased father. The only evidence offered by the petitioner was his testimony and the testimony of three members of his family that the petitioner's father had told them that he was a citizen. Neither the petitioner nor his witnesses could testify to having seen the father's naturalization papers or that he had ever voted. Denying transfer, the court said (377 F.2d at pp. 972-973):

> If Rassano's claim of citizenship is supported by evidence sufficient, if believed, to support a finding of citizenship, the executive department had no jurisdiction to pass on that claim. In reviewing the record to determine if it reveals the existence of a genuine issue as to Rassano's claimed citizenship, this court has considered the testimony of petitioner and his three witnesses as credible and in the light most favorable to him. After a thorough search of the record we have found no evidence sufficient to raise a genuine issue as to Rassano's alienage (citation omitted).

In *Tanaka v. Immigration and Naturalization Service*, 346 F.2d 438 (C.A. 2, 1965), an expatriation case decided by a divided court, the sole issue presented was whether *Tanaka* had acted voluntarily when he voted in a Japanese election and had thus lost his American citizenship. The court found that *Tanaka's* act was voluntary as a matter of law. Consequently, no question of material fact was left for resolution by a trial *de novo* before a district court. The majority opinion stated (346 F.2d at p. 440, fn. 4):

> For the purpose of this proceeding, the government accepts Tanaka's testimony as "a truthful

> and sincere account of the reasons underlying his decision to vote in the Japanese political election of June 4, 1950."

In his dissenting opinion, Judge Kaufman equated the majority's denial of transfer to a grant of summary judgment for the government and expressed his view that despite the government's factual concessions the case should be transferred so that a fuller record could be developed in the trial court (at pp. 446-447).

Jolley v. Immigration and Naturalization Service, 441 F.2d 1245 (C.A. 5, 1971), another expatriation case decided by a divided court, dealt with the question of the voluntariness of the petitioner's renunciation of citizenship. Again the majority declined to transfer the proceedings to a district court for the reason that:

> Since the facts are undisputed the presumption is inapplicable, and the question of voluntariness must be decided as a matter of law (441 F. 2d at p. 1249, fn. 5).

In *Olvera v. Immigration and Naturalization Service*, 504 F.2d 1372, 1374, 1375 (C.A. 5, 1974), the petitioner submitted no evidence to establish that he was a United States citizen at his deportation hearing. After granting one continuance of the deportation hearing, the special inquiry officer declined to grant a further continuance which had been requested by petitioner's counsel for the purpose of obtaining evidence of petitioner's citizenship. The court held that on the record there was no showing of an abuse

of discretion, and since no evidence of citizenship had been produced, there was no genuine issue of material fact as to the petitioner's nationality which would warrant transfer of the case to the district court.

Transfer of the proceedings to a district court was denied in *Maroon v. Immigration and Naturalization Service,* 364 F.2d 982 (C.A. 8, 1966) because the administrative record contained absolutely no evidence to support a claim to citizenship. The court said (364 F.2d at p. 989).

> At the hearing, petitioner testified that he did not know whether he was a citizen of the United States or of some other nation, and so could not truthfully state whether the allegation in the Order to Show Cause, to the effect that he is a citizen of Mexico, is true or false. Even in his petition for review, he makes no affirmative averment that he is a national of the United States, stating simply, "He was born on the 15th day of June, 1908, and is *of the belief* that he was born in the United States of America" (emphasis supplied by court).

It is apparent that the decision in the instant case conflicts sharply with the decisions of other circuits which have treated the statute as essentially involving summary judgment, and have thus denied transfer only where an assertion of citizenship is unsupported, or where the facts are undisputed, and considered in the light most favorable to the claimant, fail to support a finding of citizenship.

IV

REVIEW OF THE ADMINISTRATIVE RECORD BY THE COURT BELOW SHOULD NOT HAVE EXTENDED BEYOND THE DECISION OF THE BOARD OF IMMIGRATION APPEALS

In the instant case, it was improper for the court below to extend its examination of the administrative record beyond reading the decision of the Board of Immigration Appeals, the agency charged with making a final administrative decision on petitioner's claim of citizenship. It is manifest from the decision of the Board that in its view petitioner produced sufficient evidence at his deportation hearing to meet either the constitutional or the statutory evidentiary standard required for a judicial hearing. Under such circumstances, the scope of review of the court of appeals is necessarily limited to the Board's decision unless it can be demonstrated that that decision is arbitrary or totally without foundation. The Board's opinion as to the substantiality of petitioner's evidence is entitled to special respect because of the knowledge and experience it has accumulated in dealing with matters of citizenship and alienage. *Whitney Nat. Bank v. Bank of New Orleans & Tr. Co.,* 379 U.S. 411, 421 (1965); *Carpenters 46 Cty. Conf. Bd. v. Construction Ind. S.C.,* 393 F.Supp. 480, 489 (1975).

The decision below, if allowed to stand, sanctions the final resolution of petitioner's claim to citizenship by a hearing officer in the executive department where that claim " * * * involves delicate issues of credibility that could only be resolved with the benefit of

live testimony and a more complete documentary record". *Pignatello v. Attorney General,* 350 F.2d 719, 723 (C.A. 2, 1965). Petitioner derived no benefit from the appeal of the decision of the hearing officer to the Board of Immigration Appeals. That agency quite properly confined its review of the record, refusing to intrude upon the hearing officer's fact-finding function. While the majority of the panel below found petitioner's evidence not to be credible, that finding was made without hearing live testimony and without affording petitioner an opportunity to develop a more complete record in the district court. We submit that the decision below depriving petitioner of a judicial hearing on his claim to citizenship contravenes the constitutional principle enunciated in *Ng Fung Ho v. White,* supra, and violates the express terms of 8 U.S.C. 1105a(a)(5).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Dated, San Francisco, California,
November 28, 1977.

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Attorneys for Petitioner.

No. 76-1410

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH V. AGOSTO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i–ii) is not reported. The opinion of the Board of Immigration Appeals (Pet. App. iv–xiii) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1977. A petition for rehearing was denied on March 23, 1977 (Pet. App. iii). The petition for a writ of certiorari was filed on April 12, 1977, and granted on October 17, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a genuine issue of material fact exists concerning petitioner's nationality.

STATUTE INVOLVED

Section 106(a) of the Immigration and Nationality Act, as added, 75 Stat. 651, 8 U.S.C. 1105a(a), provides in relevant part:

> The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 *et seq.*) shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that—
>
> • • • • •
>
> (5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of Title 28 • • •.

STATEMENT

1. Petitioner entered the United States on or about December 11, 1966 (A. 4). He maintained that he was a citizen and displayed a United States passport. He was admitted without the inspection that would have been accorded someone who was known not to be a citizen. See generally *Reid* v. *Immigration and Naturalization Service*, 420 U.S. 619. He was convicted of a federal felony and, while in prison, was served with an order to show cause why he should not be deported (A. 4–6). The Immigration and Naturalization Service charged that petitioner had entered the United States under a false claim of citizenship, thus escaping inspection as an alien; it later expanded the charge to include the contention that petitioner was deportable because he had been convicted of three crimes involving moral turpitude, two in Italy and one in the United States (A. 21–22).

a. The order to show cause was issued on September 5, 1967. An immigration judge (then called a special inquiry officer) held a hearing at which the Service introduced documentary evidence that petitioner had been born in Italy in 1927. The evidence, later summarized by the special inquiry officer and the Board of Immigration Appeals (see Pet. App. v–vi; A. 9–12, 28–31) showed: (1) an entry in the Registry of Births for the city of Agrigento, Italy, that petitioner was born there on July 17, 1927, and had been sent to a foundling home (R. 355, 428);[1] (2) an entry in the books of the foundling home showing that petitioner was received shortly after birth and was en-

[1] "R." refers to the record in the court of appeals.

trusted to a couple who later "affiliated" him, permitting him to use their surname (R. 671); (3) a record that petitioner was baptized on July 18, 1927, and given the name Vincenzo Di Paola (R. 422). These records showed that petitioner was entrusted to Pietro Pianetti and Crocifissa Porrello Pianetti and lived with them in Licata, Italy; they "affiliated" him in 1943, and he then took their surname (R. 355, 422). Petitioner was married to Anna Vicis Vinci in Licata in 1944 (S.R. 40), and the marriage produced two daughters (S.R. 41–42).[2] Petitioner conceded that all of these documents pertained to him and that he had lived and been married in Italy (Pet. App. vi).

b. Petitioner nevertheless contended that he was a citizen of the United States, and thus not deportable, because he had been born in Cleveland, Ohio, in 1921 (S.R. 34).

Petitioner offered a duplicate of a birth certificate showing that on August 30, 1921, Giuseppe Agosto was born in Cleveland, Ohio, to Carmela Todaro Agosto and Arcangelo Agosto (R. 425–427). He offered Social Security records showing earnings in the United States beginning in 1951 (R. 433); a United States passport in the name of Joseph Agosto (R. 425); and a marriage certificate showing that petitioner, claiming to be age 32 and not previously married, was married in 1953 in Anchorage, Alaska, to Leota Richards (R. 434; see also A. 9, 14–15). These documents showed a birth in 1921, six years before the date in documents petitioner conceded pertained to him, and showed a "first" marriage in the United States by someone who conceded that he had been married before.

[2] "S.R." refers to the supplemental record in the court of appeals.

Petitioner attempted to reconcile the difference in the documentary evidence. He testified that he left Cleveland in 1925 at the age of four or five (S.R. 48, 53, 105) and traveled to Licata, where he lived first with his grandfather Porrello (S.R. 50, 105) and (after Porrello died in 1930) then with his uncle Pianetti (S.R. 106). He testified that the name Vincenzo De Paul was "imposed" on him in 1927 or 1928 (S.R. 50), although he was known earlier by the name Porrello and later as Pianetti (S.R. 50, 64).

Petitioner testified that he had been told that he had two half brothers, one of whom was named Joseph Todaro Agosto (S.R. 34, 53–54), and a half sister, Mary Agosto (S.R. 65). He testified (i) that he did not know who his natural mother was (S.R. 63); (ii) that he had been told his mother was Angela Porrello; and (iii) to his knowledge his mother was Carmela Todaro (S.R. 33, 83–84).

Petitioner also testified (S.R. 92–96, 104) that his belief that he was born in Cleveland on August 30, 1921, was based entirely on the birth certificate, which had been sent to him in Italy between 1948 and 1950 by his uncle Joseph Porrello, who then lived in Kansas City, Missouri. Before then, he asserted, he had no knowledge of birth outside of Italy. He wrote to Joseph Porrello only because Pietro Pianetti told

him in "that year" that he had been born in the United States (S.R. 95–96).

According to petitioner, he left Italy for Canada promptly after receiving the birth certificate. He used an Italian passport and traveled as Vincenzo Pianetti; he admitted that he never sought a United States passport because he believed that "Joseph Agosto" had lost his United States citizenship (S.R. 68).[1] He stated that he stayed in Canada two or three months in 1950 and went to Mexico (S.R. 107–108). He entered the United States from Mexico three times using the birth certificate of Giuseppe Agosto that Jospeh Porrello had sent him; he settled in Kansas City in early 1951 (S.R. 108–111). Petitioner then used the birth certificate to obtain a United States Citizen Card in 1954 and a United States passport in 1956 (S.R. 111). Petitioner testified he never used the name Joseph Agosto or Giuseppe Agosto before coming to the United States; he has consistently used the name, however, in the United States (S.R. 90).

c. The Service presented evidence that undermined petitioner's account of his origins. The Italian documents already described explained everything except the 1921 birth certificate of Joseph Agosto. Other evidence showed that the 1921 birth certificate—which was, according to petitioner, the sole basis of his be-

[1] Although petitioner did not produce his Italian passport for the record, Canadian records show that he arrived using the name Vincent Pianetti, at Montreal Airport, November 23, 1951, giving an age of 24, a birthplace of Licata, Italy, and the occupation of "industrial lawyer" (R. 476).

lief that he is a United States citizen (S.R. 104)—pertained to a Joseph Agosto who died in 1951 in Licata, Italy.

The evidence concerning the Joseph Agosto who was born in 1921 in Cleveland was as follows. In 1928 Joseph Agosto applied for a United States passport; at the time of application, Joseph Agosto was living in Cleveland, Ohio, with his mother Carmelo Todaro Agosto and his father Arcangelo Agosto (R. 401–404). In 1944 Joseph Agosto applied in Palermo, Italy, for registration as a United States citizen (R. 394–400). A United States passport was issued on March 20, 1947 to Joseph Agosto (R. 407–408) but in September 1948 a certificate was executed in Palermo that Joseph Agosto had lost his American citizenship. A death certificate showed that Joseph Agosto died in December 1951 in Licata, Italy (R. 389–393).

In 1928, when Joseph Agosto applied for a passport in Cleveland, petitioner was residing in Italy and was called Vincenzo Di Paola. In 1944, when Joseph Agosto sought registration, and in 1947, when Joseph Agosto received a passport, petitioner was using the name Vincenzo Pianetti. By his own admission petitioner did not begin using the name Agosto until he arrived in the United States. The Service also introduced an affidavit of Mary Agosto; she stated that she was the sister of the Joseph Agosto who was born in Cleveland in 1921, and that petitioner was falsely using the identity of her deceased brother (R. 387–

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388).[4] The 1947 passport issued to Joseph Agosto contained a picture and signature of Joseph Agosto; the picture and signature bore no resemblance to the picture and signature of petitioner submitted with petitioner's 1956 application for a passport (A. 34).

Finally, independent evidence established that the copy of the 1921 birth certificate on which petitioner had been relying could not have been sent to Italy between 1948 and 1950, as petitioner maintained (R. 94), because it was not issued until December 24, 1951 (A. 35). The copy of the birth certificate was issued, in other words, shortly after the death of Joseph Agosto in Licata, and after petitioner had left Italy—allegedly with the birth certificate in his possession and seeking to "clear up this mess of my birth" (S.R. 68).

d. The immigration judge issued his opinion on April 19, 1968 (A. 7–18). He found that petitioner's story was a fabrication. The judge concluded (A. 16) that:

> Although he has had ample opportunity, [petitioner] has presented no credible evidence that he is the Joseph Agosto born in Cleveland, Ohio in 1921. * * *
>
> * * * It is inconceivable that [petitioner] could concede that he was the Vincenzo Pianetti to whom all these records relate and still claim

[4] The record contained two other affidavits. Anna Vices Vinci submitted an affidavit identifying petitioner as Vincenzo Pianetti, her husband, born in Agrigento in July 1927 (R. 380). Crocetta Pianetti, petitioner's daughter, identified a photograph of petitioner as that of Vincenzo Pianetti (R. 381).

> that he is also the Joseph Agosto who was born in Cleveland, Ohio. The records presented here with respect to the lives of the two establish that they could not be one and the same person. Agosto was seven years older than [petitioner]. There is no record of his having married or having had children.

The immigration judge concluded that petitioner should be deported (A. 17–18).

2. Petitioner appealed to the Board of Immigration Appeals. The Board remanded the case to permit the immigration judge to consider petitioner's contention that he was entitled to relief under the "forgiveness" provisions of Section 241(f) of the Immigration and Nationality Act, 66 Stat. 204, as amended, 8 U.S.C. 1251(f) (see A. 19–20).

At the second hearing the immigration judge found petitioner to be deportable not only because he had entered the United States without inspection as an alien but also because he had been convicted of crimes of moral turpitude.[5] On Decemer 4, 1969, the judge

[5] Petitioner was convicted of the federal crime of wilfully making a false statement in connection with an application for a loan from the Federal Housing Administration: he misrepresented the amount of equity interest in the property that would serve as the security for the loan (A. 46; R. 467–471). Petitioner asked for leniency at sentencing, telling the judge that this was his first conviction (R. 525–526). He was placed on probation, which was revoked because petitioner violated its terms (A. 46).

Petitioner's representation to the United States court at sentencing was false. On August 23, 1949, he was convicted in Triponi, Italy, of fraud, and he was sentenced to five years' imprisonment, which was suspended. An Italian appellate court, on affirming the conviction, described the crime as aggravated swindling

found petitioner not entitled to "forgiveness" and again ordered him deported (S.R. 677–691).

3. Petitioner again appealed to the Board of Immigration Appeals, maintaining that he was born in Cleveland in 1921. He conceded that another Joseph Agosto had died in Licata in 1951 but argued (S.R. 659–664) that there were two Joseph Agostos, both of them sons of Arcangelo Agosto and both born in Cleveland. He was one of the two Joseph Agostos, and was born to Angela Porrello, who was Arcangelo Agosto's mistress. Petitioner contended that Porrello recorded petitioner's birth posing as Carmela Todaro, Arcangelo Agosto's wife. He also argued that the birth of the legitimate Joseph Agosto to the real Carmela Todaro had never been recorded. This, he said, explained the fact that there was only one birth certificate for a Joseph or Giuseppe Agosto.

The Board again declined to reach the merits of the case. It remanded for a second consideration of "forgiveness' relief under Section 241(f).

4. A hearing was held in 1971 on the second remand. This time petitioner produced three witnesses who testified in support of his claim of citizenship. Mr.

(A. 47). Petitioner avoided supervision under this sentence when he left Italy in 1950. Petitioner also was convicted on November 8, 1947, at Palermo, of forgery and fraud. The appellate court affirmed, describing this crime as "repeated forgery" and "usurpation of public functions" (A. 47). Petitioner served a prison sentence for this crime. His sentences for other crimes, apparently misdemeanors, were covered by an amnesty (A. 48–49). The immigration judge found that the Italian convictions were for crimes of moral turpitude.

and Mrs. Pianetti, who affiliated him in Italy in 1943, testified to a version of events that contradicted petitioner's earlier story in several critical respects.

a. Mr. Pianetti testified that petitioner was the son of Angela Porrello and Salvatore Agosto and had been born in Ohio in 1925 (S.R. 323–336). Mr. Pianetti said that he learned about petitioner's birth by reading Angela Porrello's letters to her sister, Mrs. Pianetti, and to her father, Angelo Porrello.[6] Mr. Pianetti testified that he first saw petitioner in June 1927, when he went to Palermo to pick up the boy (S.R. 446); petitioner was traveling with family friends from Ohio, whose identity Mr. Pianetti could not recall (S.R. 330, 332). According to Mr. Pianetti, petitioner was no more than two and one half years old when he arrived in Italy (S.R. 330, 332).[7] Mr. Pianetti testified that he and his wife immediately took petitioner into their home;[8] they initially lived with Angelo Porrello, petitioner's maternal grandfather, but they moved often with Pianetti's job transfers (S.R. 385, 553).[9]

[6] He also stated that none of these letters was now available, and he conceded that no document shows that petitioner was born in the United States (S.R. 346, 385).

[7] Petitioner testified that he recalled being four or five years old, and speaking English, on arrival in Italy (S.R. 53, 63, 105). Petitioner also had testified that he entered kindergarten in 1928 or 1929, at the age of six or seven (S.R. 49, 64).

[8] Mr. Pianetti testified that petitioner arrived in Italy in June 1927 (S.R. 446) and that the toddler was registered within four days of arrival (S.R. 454). Records show that the child was not registered until July 17 (S.R. 454).

[9] Petitioner had testified that he began living with the Pianettis only after his grandfather's death in 1930 (S.R. 106).

Mr. Pianetti denied that petitioner had ever lived in an orphanage (S.R. 333–334). The Italian records showing the contrary were wrong, Mr. Pianetti explained, because petitioner's grandfather, Angelo Porrello, registered petitioner with the Italian authorities under the name Di Paola to avoid having petitioner, an illegitimate son, registered as a Porrello or an Agosto (S.R. 334–336). He also stated that the 1927 birthdate in all the Italian records could have been a clerical error (S.R. 347–348). Mr. Pianetti did not state, however, that he had any personal knowledge that the records had been falsified, and indeed he testified that Angelo Porrello had never mentioned anything to him about the registration of petitioner at an orphanage (S.R. 333, 337, 348).

b. Mrs. Pianetti testified that her sister, Angela Porrello, wrote her approximately a year after she left Italy that petitioner had been born (S.R. 365). Angela Porrello emigrated to the United States in 1921, and Mrs. Pianetti's testimony therefore placed petitioner's birth in 1922 (S.R. 328–329, 455).[10] Mrs. Pianetti maintained, however, that petitioner was born in 1925 (S.R. 365).[11] Mrs. Pianetti denied any knowledge of how petitioner's Italian records came to show a 1927 birthdate (S.R. 373).

Mrs. Pianetti's testimony differed from petitioner's in several other respects. She testified that, when petitioner was 19 in 1944,[12] he was told that he was illegitimate and had been born in the United States (S.R. 380–381). Petitioner, however, testified that he learned of his United States origins only between 1948 and 1950, when Mr. Pianetti told him of his birth and he wrote to the uncle in Kansas City, who sent him the 1921 birth cirtificate (see S.R. 94–96). Mrs. Pianetti stated that petitioner started school at age six in 1933 or 1934 (S.R. 384)—this would have placed petitioner's birth in 1927 or 1928. Petitioner testified (S.R. 49, 64) that he began school at age six or seven in 1928 or 1929.

c. Carmen Ripolino testified that petitioner was his half brother (S.R. 434, 439). Ripolino was born in Akron, Ohio, in September 1925, had lived there all his life (S.R. 419), and was the son of Angela Porrello and either Charles Litizia or Giacomo Ripellino (S.R. 420–422). He had a brother, Agosto Angelo Ripolino, born August 1, 1923, in Akron; this brother also was the son of Angela Porrello (S.R. 422–424). Ripolino said that his mother told him that he also had a half brother, whom his mother had sent to Italy; he assumed that the child had been sent to live with Angela Porrello's mother but did not know this to be true (S.R. 424, 431, 437). Ripolino thought that this half brother was older than he and younger than Agosto Angelo Ripolino (S.R. 443); if petitioner were the half-brother then, he would have been born in 1924 in Akron. Carmen Ripolino stated he did not know an Arcangelo Agosto in Akron or Cleveland (S.R. 431).

Ripolino had no personal knowledge that petitioner

[10] Angela Porrello left a husband and two daughters in Italy when she emigrated in 1921 (S.R. 328–329).

[11] She also testified, at a later hearing, that petitioner was born in 1924 (S.R. 515).

[12] The Italian records showed that petitioner was 17 in 1944.

was the half brother who had been sent to Italy (S.R. 438); his mother never told him the half brother's name or where he had been sent. He testified only that he had been told by a "foster mother" that the Pianettis were petitioner's true parents and that he and petitioner therefore were first cousins (S.R. 434–436). Ripolino stated that he became aware that he and petitioner were half brothers only when petitioner called him several weeks before the hearing and told him of their relationship (S.R. 439, 442–443).

d. Petitioner testified during these hearings. He abandoned the versions of events that he had asserted previously and testified that he was born in the United States on August 30, 1924 (S.R. 530, 536, 547–548, 585). He said that he had no documents showing that he was born in the United States in 1924 (S.R. 550) and that he had not attempted to find a birth certificate showing his birth in 1924 (S.R. 551).[13]

[13] The record in this case contains two additional versions of petitioner's life history.

Petitioner executed an affidavit (R. 485–494) on June 3, 1968, during the pendency of the deportation proceedings, in connection with a friendly suit in the Superior Court for Pierce County in the State of Washington to declare Mary Marie Agosto his lawful wife. The affidavit stated that petitioner was seventeen at the time of his marriage to Anna Vicis Vinci in 1944 (A. 32–33). He relied on his birth in 1927 to show that he was too young in 1944 lawfully to marry Vinci (*ibid.*). Petitioner apparently told a similar story when he entered Canada in 1951; he told the immigration authorities there that he was 24 years old (placing his birth in 1927) and had been in Italy (see note 3, *supra*).

At the sentencing hearing on petitioner's conviction for falsification of papers in connection with the Federal Housing Administration loan, petitioner's counsel informed the judge that petitioner was "born in the United States, * * * grew up in the Midwest [and] [s]hortly before the Second World War he returned to

e. On April 11, 1973, the immigration judge filed an exhaustive opinion (A. 23–59) determining that all of petititoner's stories were fabrications. The immigration judge concluded that petitioner was born in Italy and is an alien. He found that petitioner, "since he was sixteen years of age, has a record of deceit, double dealing and subterfuge" (A. 32).

The immigration judge relied on the following facts in particular: (i) petitioner's stories are refuted by Italian documents that petitioner concedes pertain to him; (ii) petitioner's reliance on the 1921 birth certificate was convincingly overcome and effectively abandoned; (iii) petitioner's witnesses gave testimony that was internally contradictory and that contradicted petitioner's own testimony; the testimony of the witnesses, moreover, was in important respects not based on personal knowledge; (iv) petitioner lied in connection with his suit in Washington to legitimate his third marriage (see note 13, *supra*); and (v) petitioner has a long record of deceit and double-dealing (see note 5, *supra*).

The immigration judge discounted the testimony of the Pianettis because it was vague, because it was contradicted by contemporaneous records, and because they did not come forward with their stories until five years after the deportation proceedings began. The immigration judge discounted the testimony of

Italy * * * [where he] became an agent for the C.I.D. in Italy" (R. 524). Petitioner did not contradict this version of events, which was presented (along with the assertion that he was a first offender; see note 5, *supra*), in an effort to obtain a lenient sentence.

Carmen Ripolino because "all he knows about the identity of Joseph Agosto is what [petitioner] told him. He admitted this on cross-examination" (A. 39).

Finally, the immigration judge concluded that petitioner was not entitled to relief from deportation (A. 51–58), both because he entered the United States by fraud and because he had been convicted of offenses involving fraud.

5. The Board of Immigration Appeals affirmed the order of deportation (Pet. App. iv–xiii). It observed that the case for deportation rested principally on the Italian records made independently of each other and contemporaneously with petitioner's birth. All of the records showed petitioner to have been newborn in July 1927. Under any of petitioner's stories, he had been born no later than 1925, and the Board thought that the stories were facially incredible because the Italian "records appear * * * to have involved persons who would have been able to determine whether they were dealing with a newborn infant or with a child of 2 or 3 years" (*id.* at v).

The Board stated (Pet. App. viii) that the testimony of the Pianettis and Carmen Ripolino, if believed, would have contradicted the documentary evidence that petitioner was born in Italy. The Board thought, however, that it was impossible to credit the testimony. It also concluded that, even if the Pianetti and Ripolino testimony were believed, it still would be clear that petitioner is an alien because their story, even taken at face value, cannot be correct (*id.* at viii–

ix).[11] The Board held that the "clear, convincing, and unequivocal" evidence showed that petitioner is an alien (*id.* at xi), that he is deportable, and that he is not entitled to discretionary relief from deportation (*id.* at xi-xiii).

6. The court of appeals affirmed the deportation order (Pet. App. i-ii). It held that "[t]he evidence presented to the immigration judge does not disclose a colorable claim to United States nationality" (*id.* at ii) and that petitioner therefore was not entitled to a

[11] The Board stated (Pet. App. ix): "in order for us to accept [petitioner's] version of his birth, as presented by the witnesses he produced and as indicated by the other evidence of record, we would be required to find: (1) that the respondent's natural father was Salvatore Agosto (Tr. pp. 305, 340); (2) that Salvatore Agosto fathered a child born in 1921 in Cleveland, Ohio, whose name was Joseph, or Giuseppe, Agosto (Exs. 2 & 3), but that this child was *not* the respondent; (3) that the respondent's mother gave birth to a son in Akron, Ohio, in August of 1923 (Tr. p. 392), and that the father of this child was Giacomo Ripolino and not the father of the respondent (Tr. p. 395); (4) that the respondent's mother next gave birth to the respondent in August of 1924, one year later, in Cleveland, Ohio (Tr. p. 514); (5) that she knew the father of the respondent to be Salvatore Agosto (see Tr. 305, 340) and named the respondent Joseph or Joe Agosto, the same name that was given to an earlier child of the respondent's father (Tr. p. 482); (6) that the respondent's mother again began living in the same household as Giacomo Ripolino, and gave birth to a third son in Akron, Ohio, another year later in September of 1925 (Exs. 60 & 61; Tr. p. 399); (7) that the respondent's mother had him baptized in the United States (Tr. pp. 355–57); (8) that the respondent, who can afford to send an investigator to Italy to search records (Tr. pp. 425–26), has not yet been able to produce a certificate of his United States baptism, even though he ostensibly knows the name under which he would have been baptized and the general vicinity of Ohio in which the baptism likely would have occurred."

trial *de novo* in the district court concerning the question of his citizenship.[15]

Judge Hufstedler dissented (Pet. App ii). She explained that as a factfinder she would not have accepted petitioner's versions of events, but she concluded that the case presented questions of credibility that should be resolved by the district court in a trial *de novo*.

SUMMARY OF ARGUMENT

Section 106(a)(5) of the Immigration and Nationality Act is part of a general revision of the statutory provisions for judicial review of deportation orders. The revision, as a whole, was designed to prevent repetitious litigation of frivolous claims by eliminating in most instances any review by district courts of deportation decisions. Section 106(a)(5) is a narrow exception to the usual rule. It requires referral to the district court for trial when a person raises substantial issues of fact concerning his citizenship. A person must clear two hurdles to obtain a trial *de novo* in the district court: he must show that his claim of United States citizenship is not frivolous, and he must show that resolution of that claim turns on "a genuine issue of material fact."

[15] Although petitioner had abandoned before the immigration judge the claim that he had been born in 1921 in Cleveland, his opening brief in the court of appeals relied on the 1921 birth certificate and reiterated the story that petitioner had given at the first hearing, that he was born in Cleveland in 1921 (Br. 5–6). A supplemental opening brief for petitioner (Supp. Br. 5–6) continued to rely on the 1921 birth certificate but also stated that petitioner was born in 1924.

The requirement that a genuine issue of material fact must be at issue is quite similar to the standard under which courts grant summary judgment and direct verdicts. A court may withdraw a case from the factfinder when the tendered evidence is too incredible to be accepted by reasonable minds. Indeed, this Court has stated that a factfinder may not accept testimony that "carries its own death wound." *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U.S. 656, 660. Petitioner's arguments are too incredible to be accepted by reasonable minds, and his evidence carries its own death wounds.

Documentary evidence, which petitioner concedes relates to him, shows that he was born in Italy in 1927, married and had children in Italy, acquired a criminal record in Italy, and then emigrated to Canada in 1951. The documentary evidence includes three independent records of his birth in 1927 in Agrigento, Italy, showing him to be only a few days old at the time the records were made; these records were each made by persons who were in a position to know whether they were dealing with a newborn infant. No documents show that petitioner was born in the United States or traveled from the United States to Italy as a child or youth. The absence of documents that could have demonstrated petitioner's birth in the United States is conspicuous and unexplained.

Against this documentary record, petitioner offered at least five conflicting stories of his origins and youth. When one story was discredited, petitioner substituted another. The conflicts among and within the stories

remain unexplained, and these conflicts involve many matters that should have been within petitioner's knowledge. Taken together, these twists and turns lead inevitably to the conclusion that petitioner's tales are fabrications.

Indeed, petitioner's stories could not survive a motion for summary judgment if the case were referred to the district court. And if the district court entered judgment for petitioner, the decision would be reversed on appeal as clearly erroneous. The conclusion that petitioner has presented no colorable claim of United States citizenship has been concurred in by three tribunals, and it is entitled to substantial deference by this Court. The purpose of Section 106(a)(5) does not extend to providing a trial *de novo* for petitioner's fanciful claims, and the court of appeals was entitled finally to reject his contentions.

ARGUMENT

PETITIONER HAS NOT PRESENTED A DISPUTED ISSUE OF MATERIAL FACT REQUIRING A TRIAL DE NOVO

A. THE COURT OF APPEALS MAY FINALLY RESOLVE FRIVOLOUS CLAIMS OF CITIZENSHIP

Section 106(a)(5) of the Immigration and Nationality Act is part of a thorough revision of deportation procedures enacted in 1961. The revision, as a whole, was designed "to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics

in the courts." *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217, 224. "The key feature of the congressional plan directed at this problem [of repetitious litigation of frivolous claims in order to obtain delay] was the elimination of the previous initial step in obtaining judicial review—a suit in the district court—and the resulting restriction of review to Courts of Appeals" (*id.* at 225).

Section 106(a)(5) creates a narrow exception to the statutory rule that deportation decisions are reviewed on the record of the administrative proceedings. It provides that when a person "claims to be a national of the United States and makes a showing that his claim is not frivolous," and when, in addition, "a genuine issue of material fact as to the petitioner's nationality is presented," the court of appeals shall transfer the case to the district court for a trial *de novo* of the nationality claim. Congress apparently intended this exception to satisfy the constitutional requirement that no person who makes a "substantial" claim of citizenship may be deported without judicial scrutiny. *Kessler* v. *Strecker*, 307 U.S. 22, 35 (dictum); *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149; *Ng Fung Ho* v. *White*, 259 U.S. 276. See H.R. Rep. No. 1086, 87th Cong., 1st Sess. 26–29 (1961).

Both the language of the statute and its legislative history demonstrate that no person has an automatic entitlement to a *de novo* hearing. A person seeking such a hearing must clear two hurdles. First, he must demonstrate that his claim of citizenship is not "friv-

olous," for the courts of appeals may finally resolve frivolous claims. Second, he must demonstrate that the resolution of his claim of citizenship turns on "a genuine issue of material fact". Congress was concerned that referral to the district court not be automatic, because routine referral for trial would recreate the substantial delays that the 1961 legislation was intended to eliminate, and would reward dissembling aliens with several additional years of residence in this country. Under the statute the case must be transferred to the district court only when "a substantial claim of U.S. nationality" or "a genuine claim of nationality" creates factual issues. H.R. Rep. No. 1086, *supra,* at 26–29.

The statutory standard—the existence of "a genuine issue of material fact" concerning a non-frivolous claim of citizenship—is quite similar to the standard under which district courts may grant summary judgment before trial or take a case away from a jury after trial. Under the accepted principles for granting summary judgments and directed verdicts, a court may withdraw a case from the factfinder when the "tendered evidence is in its nature too incredible to be accepted by reasonable minds." *Whitaker* v. *Coleman,* 115 F. 2d 305, 306 (C.A. 5).[16] Indeed, this Court has stated that a factfinder *cannot* accept testimony that "carries its own death wound" (*National Labor Re-*

[16] This standard has been adopted by many courts. See, *e.g., Miller* v. *Miller*, 122 F. 2d 209, 212 (C.A.D.C.); *Camerlin* v. *New York Central R.R.*, 199 F. 2d 698 (C.A. 1).

lations Board v. *Pittsburgh Steamship Co.*, 337 U.S. 656, 660), even though the factfinder may be impressed by the witness's demeanor. For the reasons explained below, we submit that petitioners' stories are "too incredible to be accepted by reasonable minds" and "carr[y] their own death wounds." Petitioner's claim of citizenship is frivolous, and under Section 106(a)(5) the court of appeals was entitled finally to reject his contentions.[17]

B. PETITIONER'S INCONSISTENT AND UNDOCUMENTED STORIES DO NOT PRESENT A COLORABLE CLAIM OF CITIZENSHIP

Documentary evidence, which petitioner concedes pertains to him, shows that he was born in Italy in 1927, raised by an Italian couple, affiliated by the couple in 1943, married in Italy in 1944, convicted in Italy of several crimes, emigrated to Canada under the name Vincenzo Pianetti in November 1951, and

[17] Petitioner relies (Br. 11–12, 15–18) on a number of appellate cases that, he says, require a trial *de novo* of any claim of citizenship, however improbable the claim may be. The cases do not support that principle. For example, *Pignatello* v. *Attorney General*, 350 F. 2d 719 (C.A. 2), held only that Pignatello's claim was not frivolous, and it did not adopt any legal standard for the determination of frivolity, or for the determination of the existence of a disputed issue of material fact, other than the ones we discuss in the text. Other cases hold that there is no need for a trial *de novo* when a claim of citizenship is incredible on its face. See, *e.g., Rassano* v. *Immigration and Naturalization Service*, 377 F. 2d 971 (C.A. 7) (claim based on undocumented testimony of relatives is not credible; no need for trial *de novo*); *Maroon* v. *Immigration and Naturalization Service*, 364 F. 2d 982 (C.A. 8) (an undocumented claim of birth in the United States does not require a trial *de novo*).

finally traveled to the United States.[18] No document shows that petitioner was born in the United States or traveled from the United States to Italy in his youth.

The documentary evidence is overwhelming. Petitioner, on the other hand, has offered at least five conflicting stories of his origin and youth.

The first story was offered to a United States court at sentencing in 1967. Petitioner contended that he was born in the United States and did not move to Italy until the late 1930s. He also told the court that he had never before been convicted of a crime, although he knew that to be false.

The second story was offered to the Immigration and Naturalization Service in 1968. Petitioner told the Service that he was born in Cleveland in 1921 to a particular couple, traveled to Italy in 1925, attended

[18] The evidence summarized here is in the administrative record, which we recount in greater detail at pages 3–14, *supra*. Petitioner does not contend that the administrative hearings were inadequate to allow him to present his evidence, and he does not contend that he would present to the district court any evidence that is not already in the administrative record. He seems to argue, however, that the administrative record should not be considered because the Board of Immigration Appeals did not recite all of it (Br. 19–20). But Section 106(a)(5) provides that the court of appeals shall decide the case on "the pleadings and affidavits filed by the parties," not on the basis of the opinion of the Board. In this case the entire administrative record was filed with the court of appeals; petitioner liberally referred to it in his briefs in that court. The record should be considered here as well. If a petitioner may refer to evidence outside the Board's opinion to show that he has made a substantial claim of citizenship, then it is appropriate to refer to the record to show that a claim is insubstantial.

kindergarten in 1928 or 1929, stayed with the Porrellos until 1930, stayed with the Pianettis thereafter, and did not learn of his United States origins until Mr. Pianetti told him of them in 1948, 1949, or 1950. He then promptly obtained a birth certificate showing that Giuseppe Agosto was born in Cleveland in 1921 and set off in search of his roots, arriving in Canada in 1950.

The third story was offered to the Immigration and Naturalization Service after it became clear that the second story would not serve. Documentary evidence showed that the Giuseppe (Joseph) Agosto born in Cleveland in 1921 was not petitioner. The real Joseph Agosto traveled to Italy and died in Licata (petitioner's home town) in December 1951. The birth certificate that petitioner claimed was his own, and in his possession no later than 1950, was not even issued until December 1951—after petitioner's arrival in Canada. In response to this convincing proof, petitioner maintained that two Joseph Agostos were born in 1921, sons of the same father but by different women. His mother, petitioner said, was his father's mistress but posed as his wife to register petitioner's birth. Petitioner never explained why wife and mistress would have given the same name to sons of the same father or why there was only one birth certificate for a Giuseppe or Joseph Agosto born in Cleveland.

The fourth story was told to a Washington court in 1968. He told that court that he had been born in 1927, so that when he married in Italy in 1944 he was under the legal age. This made his marriage void, he

said, leaving him free to marry again.[19] This is similar to a story petitioner told in 1951, when he represented to Canadian officials that he was born in 1927 in Italy (see note 3, *supra*).

The fifth story was offered by petitioner and three witnesses at the third hearing before an immigration judge. Petitioner abandoned all of his other theories [20] and contended that he had been born in 1924 as the illegitimate son of the same man who was the father of the Giuseppe Agosto born in Cleveland in 1921. He arrived in Italy in 1927, he said, and immediately joined the Pianetti family. He placed his birth in 1924 because, according to the testimony of one witness, his older and younger half-brothers were born in Akron, Ohio, in 1923 and 1925. But the Pianettis, the Italian couple who affiliated him, told different stories, placing his birth between 1922 and 1925. The three witnesses contradicted themselves, contradicted each other, and contradicted petitioner in important respects. None of the witnesses claimed personal knowledge of most of

[19] Petitioner also stated in an application for a marriage license in 1953 in Alaska that he had never been married previously.

[20] The claim that the 1921 birth certificate pertained to petitioner was well on the way to being abandoned when petitioner admitted that he did not go to the United States Consulate in Palermo in 1951 to obtain a passport as Joseph Agosto because he believed that Joseph Agosto had at one time lost his United States nationality (S.R. 68). Instead he chose to go to Canada as "Vincent Pianetti" on an Italian passport and then attempted to enter the United States from Mexico using only the 1921 birth certificate. He told the Canadian officials that he was born in 1927 in Italy (see note 3, *supra*). If petitioner really had believed that the birth certificate, of which he allegedly knew at the time, pertained to him, he could have obtained a United States passport in Italy and traveled with it.

the important points of the story; petitioner did not produce a birth certificate for *any* Agosto born in Akron or Cleveland between 1922 and 1925. Mrs. Pianetti testified that petitioner was told of his origins in 1944 (four to six years before petitioner testified that he learned of them, for the first time, from Mr. Pianetti).

The conflicts within and between petitioner's stories remain unexplained. A number of these inconsistencies concerned facts that should have been within petitioner's knowledge. It is unlikely that a person would err by five years in setting the date he began school, particularly when he does not claim any breaks in schooling of uncertain duration; yet such a discrepancy appears in the record (compare S.R. 49, 64 with S.R. 384). It also is unlikely that a child would not remember with whom he lived until the age of five (or nine, depending on the birth date used), but the record shows just such a lapse in petitioner's memory (compare S.R. 50, 105, 106, with S.R. 385, 553). Finally, it is incredible that a person would not be able to date with precision the year in which he, as a young man, was told he was illegitimate and began a search for his American identity, but the record shows that petitioner could not do so within four to six years (compare S.R. 95–96 with S.R. 380).

Mrs. Pianetti's testimony concerning petitioner's birthdate provided several distinct birthdates, yet she, above all other people, should have known the details of his life. Mr. Pianetti's testimony concerning the details of petitioner's registration in Italy was in-

ternally contradictory. The Pianettis' testimony about petitioner's early life was not so detailed that the wealth of detail alone would suggest that the story was true. Indeed, the Pianettis denied having any mementos of any sort of petitioner's youth (S.R. 346, 385).[21]

Petitioner admits that he made no effort to find a birth certificate showing his birth in 1924 or 1925, the critical dates under the theory that he now espouses. Although the Pianettis testified that petitioner was baptized at birth by his mother in Ohio (S.R. 387–388), petitioner has produced no evidence

[21] Petitioner makes much (Br. 4, 13) of the Pianettis' testimony that the records of petitioner's birth were falsified. Mrs. Pianetti, however, denied any knowledge of how petitioner came to be registered as born in 1927 (S.R. 372), and Mr. Pianetti claimed no personal knowledge of their falsification; he advanced only the hypothesis that the dates on three separately-made records might have been clerical errors (S.R. 347–348).

Petitioner also contends (Br. 4) that a lawyer sent by him to Italy to examine the records found unspecified irregularities. The lawyer, however, knew almost no Italian (S.R. 458), and he was not conversant with Italian law or recordation procedures—and certainly not with procedures in Agrigento in the 1920s. He did not see all of the relevant records; he went to the capitol building (S.R. 460) and not to the orphanage (S.R. 491–493). For example, he did not find the records of baptism (S.R. 469, 491) that were introduced in the record by the government, and so his testimony concerning "gaps" in the record is worthless.

Finally, petitioner contends (Br. 13) that "a good part of [the Pianettis'] testimony was corroborated by Carmen Ripolino." But Ripolino was unable to confirm that the child sent by his mother somewhere in Italy at an unspecified date was petitioner, and the accuracy of his recollection should be considered in light of his admission that petitioner provided him with the "knowledge" about which he testified.

of a baptismal record or evidence that such a record has been lost.[22] No travel document authorized petitioner's alleged trip from the United States to Italy in 1927. Petitioner did not present any witnesses who had an independent recollection of his birth and youth in Ohio, nor did he explain why none was available.

It is fair to say, in sum, that petitioner's claim of citizenship is preposterous. Italian records place his birth there in 1927. Petitioner, whose varying stories place his birth in Ohio between 1921 and 1925, cannot explain how three independently made records could identify him as one or two days old in July 1927, except to say that the dates on them may be clerical errors or to make bare allegations that they were falsified. Petitioner has changed stories over and over. He told one story to a federal court and another to the immigration judge. While telling that story to the immigration judge he told a third to a state court. He told still another story when the second collapsed, and then he abandoned all of his stories in favor of a fifth version. His stories contradict each other, and his witnesses contradict themselves. After 10 years of hearings, the only documentary evidence petitioner has introduced is the birth certificate of a man who died in Italy in 1951.

[22] It is not necessary to determine whether the Pianettis were deliberately untruthful, because petitioner's story as a whole clearly does not raise any colorable claim of citizenship. An untruth obvious from the face of the record does not raise either an issue of credibility (cf. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 470–472) or a genuine issue of fact.

These tales carry their own death wounds. Petitioner's version of events could not survive a motion for summary judgment in the district court; if the court heard evidence, petitioner's case could not survive a motion for a directed verdict. If the district court were to enter judgment in petitioner's favor, it would be reversed as clearly erroneous.[23]

The immigration judge, the Board of Immigration Appeals, and the court of appeals found that petitioner had not presented even a colorable claim of citizenship.[24] That decision, concurred in by three separate tribunals, is entitled to substantial deference in this Court. Cf. *Berenyi* v. *Immigration Director,* 385 U.S. 630. It is extraordinarily implausible that a fourth tribunal could come to a different conclusion, and there is, therefore, no need for a trial *de novo.* The court of appeals provided petitioner with judicial

[23] The "clearly erroneous" standard (Fed. R. Civ. 52(a); and see *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394–395) would apply on appeal from a decision in petitioner's favor because Section 106(a)(5) provides that litigation on a trial *de novo* shall be conducted as if it were under 28 U.S.C. 2201, the Declaratory Judgment Act. *Cf.* 2 Gordon and Rosenfield, *Immigration Law and Procedure* § 8.30c at n. 33.

[24] Petitioner contends (Br. 15–18) that the court of appeals overstepped its authority by evaluating the credibility of his witnesses and rejecting their testimony. But the court did not purport to decide the witnesses' credibility; it held only that petitioner never made out a "colorable claim" (Pet. App. ii) of United States citizenship. Petitioner's arguments can be rejected without resort to demeanor evidence or the other forms of observation that would be available only on a *de novo* hearing. The court of appeals found simply that a factfinder could not accept petitioner's version of events.

review of his claim of citizenship and found it wanting. If petitioner's fanciful tales are enough to obtain a trial *de novo,* then any person claiming to be a citizen may obtain such a trial. That is not the purpose for which Section 106(a)(5) was designed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In the Supreme Court
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OCTOBER TERM, 1976

No. 76-1410

JOSEPH V. AGOSTO,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In attempting to establish that the Board of Immigration Appeals found that petitioner failed to present a colorable claim of United States citizenship (Br. 20, 30), respondent has rewritten the most significant portion of the Board's decision.

The Board's Decision (Pet. App. viii)	Respondent's revision (Br. 16)
"If believed, the testimony of the Pianettis and of Carmen Ripolino *clearly refutes* the Service's otherwise strong documentary demonstration of the [petitioner's] alienage. The immigation judge, however, found the Pianettis not to be credible witnesses • • • The immigration judge was in the best position to judge the veracity of these witnesses • • • It is *not beyond the realm of possibility* that the [petitioner's] claim to United States citizenship is legitimate" (emphasis supplied).	"The Board stated • • • that the testimony of the Pianettis and Carmen Ripolino, if believed, would have *contradicted* the documentary evidence that petitioner was born in Italy. The Board thought, however, that it was *impossible* to credit the testimony. It also concluded that, even if the Pianetti and Ripolino testimony were believed, it still would be clear that petitioner is an alien because their story, *even taken at face value, cannot be correct* • • •" (emphasis supplied).

This revision—turning the Board's decision deferring to the immigration judge on the critical issue of credibility into a judgment by the Board that the petitioner's evidence was facially incredible—allows respondent to argue that three separate tribunals have concurred in a finding that petitioner has not presented a colorable claim of citizenship, and that this Court should defer to their finding (Br. 20, 30). Further, it allows respondent to avoid meeting the issue of whether or not it was proper for the court of appeals *under the particular circumstances of this case* to extend its examination of the administrative record beyond reading the decision of the Board of

Immigration Appeals.[1] That decision manifested the Board's view that petitioner's evidence was substantial, and that credibility was the determinative factor in resolving his claim. Hence, the court of appeals' inquiry conducted under 8 U.S.C. 1105a(a)(5) should have come to an end with its examination of the Board's decision wherein the existence of a genuine issue of material fact was clearly revealed.

This is not the usual case involving review by a court of appeals of a decision of an administrative agency to determine if its findings are supported by substantial evidence. In such an instance, the record as a whole must be reviewed. *Universal Camera Corp. v. N. L. R. B.*, 340 U.S. 474. Here, however, the role of a court of appeals is essentially similar to that of a district court considering a motion for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter ol law, where it is quite clear what the truth is, * * * [and where] no genuine issue remains for trial * * * [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 627. Furthermore, it is axiomatic that a court must view the record in the light most favorable to the party opposing summary judgment.

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[1]Respondent alludes to this issue by misstating petitioner's position as follows: "[Petitioner] seems to argue, however, that the administrative record should not be considered because the Board of Immigration Appeals did not recite all of it • • •" (Br. 24, fn. 18)

Had the court below followed accepted summary judgment principles the decision of the Board would have told the court all it needed to know—that petitioner's claim could not be resolved as a matter of law inasmuch as his evidence, if believed, was sufficient to support a finding that he was a citizen by birth in the United States. In substituting its judgment for the judgment of the Board on the question of whether a genuine issue of material fact exists, the court below improperly acted as a fact finder, assessing the credibility and the weight of petitioner's evidence. By so doing, it deprived petitioner of his constitutional and statutory right to a trial *de novo* in district court where live testimony could be heard and a complete record could be developed.

Respectfully submitted,
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